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In The
Supreme Court of the United States

FATHI YUSUF MOHAMMED YUSUF, a/k/a FATHI YUSUF; WALEED MOHAMMED HAMED, a/k/a WALLY HAMED; WAHEED MOHAMMED HAMED, a/k/a WILLIE YUSUF; MAHER FATHI YUSUF, a/k/a MIKE YUSUF; ISAM MOHAMAD YOUSUF, a/k/a SAM YOUSEF; UNITED CORPORATION, dba Plaza Extra Supermarkets, and NEJEH FATHI YUSUF,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit erred in approving a search where the search warrant affidavit was not attached to the warrant and the warrant permitted a search for evidence of all "illegal activities" and all "illegal business activities," without limitations or particularity.

2. Whether the Third Circuit erred in permitting a search for evidence of any "illegal activit[y]." contrary to the rulings of this Court and of numerous other circuits that condemn the use of overbroad categories in search warrants.

PARTIES BELOW

All of the parties are listed in the caption of the case. There are no parent or subsidiary companies to be listed under the provisions of Rule 29.6

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PETITION FOR A WRIT OF CERTIORARI

Fathi Yusuf, Mohammed Yusuf, Waleed Mohammed Hamed, Waheed Mohammed Hamed, Maher Fathi Yusuf, Isam Mohamad Yousuf, United Corporation d/b/a Plaza Extra and Nejeh Fathi Yusuf respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 24, 2006.

OPINIONS BELOW

The order of the Third Circuit refusing en banc review is unreported and is reproduced in Appendix C at App. 79-80. The opinion of the United States Court of Appeals for the Third Circuit is reported at 461 F.3d 374 (3d Cir. 2006) and is reproduced in App. B at App. 1 - 46. The opinion and order of the District Court for the District of Virgin Islands is not reported and is reproduced in App. B at App. 47-78.

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was issued on August 29, 2006. A request for additional time to file a motion for rehearing was granted until September 21, 2006. A timely petition for rehearing was filed on September 21, 2006. The petition was denied on October 5, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

The Fourth Amendment to the Constitution

states: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

STATEMENT OF THE CASE

This appeal arises from Petitioners' efforts to suppress evidence seized in violation of the Fourth Amendment. The District Court suppressed the evidence for lack of probable cause after a *Franks v. Delaware* hearing. The District Court found that the warrant affidavit demonstrated a reckless disregard for the truth and excised the offending material. The remaining allegations were insufficient to show probable cause with respect to any of the crimes alleged. Accordingly, the District Court suppressed the seized evidence. See Appendix B, decision of District Court, App. 47- 78. The Third Circuit reversed the District Court's findings and established a "flexible standard" test allowing one government official to rely on information supplied by another government official so long as the agent acted in good faith and other conditions were met, contrary to this Court's holding in *Whiteley v. Warden*, 401 U.S. 560 (1971). The Third Circuit went a step further and held that even without the excised paragraphs from the affidavit, the remaining content of the affidavit supplied probable cause.

The Third Circuit proceeded to address Petitioners' other grounds for suppression that had not been ruled upon by the District Court, namely whether

the warrant failed for lack of particularity. Petitioners believe the Third Circuit erred by excusing gross drafting deficiencies that allowed the executing agents to treat the warrants as general warrants prohibited under the Fourth Amendment.

The breadth of the searches was the result of search warrants which allowed the agents to search for evidence of any "illegal activity" and any "illegal business activity." The agents were given virtual *carte blanche* to search anywhere in the stores, homes, and personal belongings of Petitioners for anything that they believed fell within those broad categories.

When a search warrant contains broad, unrestricted language, it violates the "particularity" requirement of the Fourth Amendment, which requires the warrant to "particularly describe[] the place to be searched and the persons or things to be seized." It becomes a "general warrant" condemned by the Fourth Amendment. Examples of overbroad language that have been held to violate the particularity requirement of the Fourth Amendment include a search for evidence of "smuggled goods," *Boyd v. United States,* 116 U.S. 616, (1886); evidence of "obscene materials," *Marcus v. Search Warrant,* 367 U.S. 717 (1961); and evidence of "books, records, pamphlets, cards, lists, memoranda, pictures, recordings, and other written instruments concerning the Communist Party of Texas," *Stanford v. Texas,* 379 U.S. 476 (1965). Since those broad definitions violate the particularity requirement of the Fourth Amendment, surely a warrant that allows agents to search for evidence of any "illegal activit[y]" must do so as well.

Nor were the agents limited by a search warrant

affidavit that might have guided their search or controlled the extent of their activities. The Court of Appeals ignored the requirements of the Court's recent decision in *Groh v. Ramirez*, 540 U.S. 551 (2004), as well as decisions of numerous other circuits emphasizing the importance of attaching the affidavit to the warrant to guide and limit the search. *See e.g. United States v. Leary*, 846 F.2d 592, 594 (10th Cir. 1988); *United States v. Grubbs*, 377 F.3d 1072, 1077 (9th Cir. 2004).

Factual Background

By warrant dated October 19, 2001, United States Magistrate Judge Geoffrey W. Barnard authorized the search of eight separate locations, including three supermarkets owned by the corporate defendant, United Corporation d/b/a Plaza Extra, located in St. Thomas and St. Croix in the Virgin Islands; three individual Petitioners and their residences; and the seizure of a wide-ranging assortment of objects and documents. Pursuant to this warrant, officers and agents of several Federal and U.S. Virgin Islands law enforcement agencies (including the FBI, the ATF, the IRS, the HIDTA, and the Virgin Islands Police Department) performed simultaneous raids on various locations in the pre-dawn hours of October 23, 2001. Women's handbags, children's schoolbags, airducts, and spaces above ceilings and below staircases were searched. In one instance, an agent stripped and dived into a cistern next to the home of an individual defendant and swam around looking for some unknown object. The fruit of the day-long searches was a mountain of documents, personal belongings, computers, family photographs, and innumerable other items.

The several warrants failed to particularize the property to be searched and seized. Instead they authorized the search of the subject premises for 13 broad categories of evidence set forth in an attachment, "Exhibit B." The first paragraph of Exhibit B referenced:

> Any and all records ... of money laundering and *illegal business activities*, including Money Laundering and Conspiracy to Commit Money Laundering, Failure to Report Exporting of Monetary Instruments, Mail Fraud, Wire Fraud, Alien Smuggling, Food Stamp Fraud, and Conspiracy to commit the same from 1990 to the present pertaining to United Corporation d/b/a Plaza Extra, Plessen Enterprises, Inc., Hamdan Diamond Corp., Sixteen Plus Corp. and any affiliated companies, as well as their principals, Waleed "Wally" Hamed and Waheed "Willy" Hamed; ... (emphasis added)

See App. 36

Following this introductory paragraph were 13 categories of evidence that could be seized, including: "1. Audit reports and financial statements of the above-listed companies and persons;" "2. All financial records, including monthly statements, cancelled checks, deposit slips, certificates of deposit, of any and all banks and financial institutions where the above-listed companies and persons may have accounts; "3. Any and all securities held or owned by the above-listed companies and persons and related records;" "6. Any and all contracts, agreements and correspondence;" "9. Telephone records, Rolodex

records, telephone answering machine tapes; and "10. Video tapes, disks or records." The 13th category is a catch-all, and broadly authorized the agents to seize: "Any other records of money laundering and *illegal activities*. . . . . " (emphasis added)(App. 36).

Three gross drafting deficiencies marred the search warrants. First, the warrants failed to incorporate the underlying affidavit and nowhere else informed the searching agents of the facts constituting the criminal activities about which they were seeking evidence. Second, they failed to identify the allegedly violated statutes by title and section within the U.S. Code, or otherwise to describe the statutory elements to guide the agents when executing the warrants; instead, they provided only generic descriptions of enumerated offenses, such as "mail fraud", "wire fraud" or "money laundering," notwithstanding that these are broad and complex offenses derivative of other offenses nowhere described in the warrants. And third, the warrants included "catch-all" provisions that broadly authorized the agents to search for evidence of any and all "illegal activities" or "illegal business activities," thereby giving the agents unfettered discretion, in manifest violation of the constitutional prohibition against general searches.

Although Petitioners raised the particularity argument their briefs to the District Court, that court did not reach that issue, relying instead on the lack of probable cause in the search warrant affidavit, as described briefly above. The Court of Appeals, however, considered the "particularity" issue raised by Petitioners but not considered by the District Court. (See fn.18 at App. 37) The Circuit distinguished *Groh*

v. Ramirez, supra, recently decided by this Court, noting that in *Groh*:

> Although the application was extremely detailed and particularly described the place to be searched and the items to be seized, the warrant itself "failed to identify *any* of the items that [the agent] intended to seize."
> (App.39)

Thus, argued the Circuit, *Groh* does not control here because the instant warrant contained a description of the things to be seized, namely the list of materials in Exhibit B, which allowed the search for all "illegal business activities." The Court also found that the description of things to be seized -- permitting a search for all "illegal business activities" and all "illegal activities" -- was satisfactory. As a basis for its conclusion, the Circuit relied on *Andresen v. Maryland*, 427 U.S. 463, 480 n. 10 (1976), which permitted the search for "other fruits, instrumentalities and evidence of crime at this (time) unknown." Citing *Andresen*, the Circuit held that general descriptions such as "all illegal activities" could satisfy the particularity requirement, reasoning as follows:

> The warrants in our case are even more specific than the warrant in *Andresen*. Our warrants state that the Government sought to search for evidence of money laundering and illegal business activities. In Exhibit B, paragraph a., "illegal business activities" is defined as "Money Laundering and Conspiracy to Commit Money Laundering, Failing to Report Exporting of Monetary Instruments, Mail Fraud, Wire Fraud, Alien Smuggling, Food

> Stamp Fraud, and Conspiracy." (App.402.) Thus, unlike the term "crime" in *Andresen*, which the Court had to view in context to determine that it referred to the crime of false pretenses, the term "illegal business activities" is specifically defined in the warrant. Accordingly, we will interpret paragraph 13 with respect to that specific definition. Under this interpretation, it is clear that paragraph 13 does not transform the warrants into general warrants. (App.44-45)

The Circuit's analysis is incorrect. There is no way to interpret the language of Exhibit B as "specifically defining" "illegal activities". If "illegal activities" were limited or defined to cover specific crimes as the panel asserts, the language would have allowed the seizure of documents as follows:

> a. Any and all records, whether typed or handwritten, or stored on paper, magnetic or electronic medium (including information stored on computer systems of *illegal business activities, specifically defined* as Money Laundering, etc.

But the search warrant did not read this way: it unambiguously authorized the seizure of all evidence relating to "illegal business activities" *and* (that is, in addition to) "money laundering" and the other crimes listed. No language of definition or limitation appears anywhere in the warrant. Specific crimes are listed, and *in addition to* those specific crimes there is a broad mandate to find evidence of any other "illegal business activity."

The warrant's over-breadth is reinforced by the lack of definition of the documents to be seized. The language in paragraph 13 is a catch-all allowing the seizure of "any other records of money laundering *and illegal activities*, including but not limited to" certain categories of material. Again, "illegal activities" is neither defined nor limited, but rather listed in parallel with "money laundering" as a separate and distinct category, "money laundering *and illegal activities*." Further, the language that follows permits seizure of any documentary evidence relating to any "illegal activity."

REASONS FOR GRANTING THE WRIT

The Third Circuit Erroneously Validated a General Warrant That Permitted a Search for All "Illegal Activities" and Was Not Limited by Any Defining Terms or by Attachment of the Search Warrant Affidavit.

General search warrants are prohibited by the Fourth Amendment, which requires that warrants "particularly describ[e] ... the persons or things to be seized." U.S. Const. Amend. IV. This requirement prevents a "general, exploratory rummaging in a person's belongings," *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971), and "makes general searches ... impossible and prevents the seizure of one thing under a warrant describing another." *Stanford v. Texas*, 379 U.S. 476, 485 (1965).

The particularity requirement serves an important purpose. As the Third Circuit explained in *United States v. Ritter*, 416 F.3d 256, 264-65 (3d Cir. 2005):

> Apart from requiring probable cause, the warrant clause of the Fourth Amendment also unambiguously requires that warrants must particularly describe "the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The particularity requirement not only prevents general searches, but also "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (citation omitted).

To meet constitutional muster, a warrant must describe the things to be seized with sufficient particularity to "enable the searcher to reasonably ascertain and identify the things authorized to be seized," *United States v. Leary*, 846 F.2d 592, 600 (10th Circuit 1988), and be "no broader than the probable cause on which it is based," *United States v. Zimmerman*, 277 F.3d 426, 432 (3rd Cir. 2002) (quoting *United States v. Weber*, 923 F.2d 1338, 1342 (9th Cir. 1991)).

Moreover, "[s]earch warrants for documents are generally deserving of somewhat closer scrutiny with respect to the particularity requirement because of the potential they carry for a very serious intrusion into personal privacy." 2 LaFave, § 4.6(d), at 249-50; *see Andresen v. Maryland*, 427 U.S. 463, 482 n. 11 (1976) (unique danger inherent in executing a warrant authorizing search and seizure of a person's papers as opposed to physical objects requires courts to "take care to assure that they are conducted in a manner that

minimizes unwarranted intrusions upon privacy").

All of these requirements were ignored in the present case.

A. The Warrants Failed to Incorporate the Affidavit and Were Overbroad in Permitting a Search for All "Illegal Activities"

Warrants authorizing a search for generic laundry lists of evidence (limited only by general references to federal statutes or crimes) and lacking a description of the specific criminal activity suspected and its connection to the items sought, have consistently been deemed unconstitutionally overbroad. This Court emphasized this issue in its recent decision in *Groh v. Ramirez*, 540 U.S. 551 (2004). In that case the warrant did not identify the things to be seized. In the section of the warrant that called for a description of the "person or property" to be seized, the "petitioner typed a description of respondents' two-story blue house rather than the alleged stockpile of firearms. The warrant did not incorporate by reference the itemized list contained in the application" *Id.* at 554-55. Nor was the search warrant affidavit attached to the warrant itself. This rendered the warrant fatally defective.

> The fact that the *application* adequately described the "things to be seized" does not save the *warrant* from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents. . . . . "The presence of a search warrant serves a high function," *McDonald v. United States*, 335 U.S. 451, 455

> (1948), and that high function is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for her inspection.

540 U.S. at 557-58

This rule has been adopted by virtually all lower courts. For example, in *United States v. Leary*, 846 F.2d 592, 594 (10th Cir. 1988), the affidavit was not attached to the warrant and the warrant contained no statement of the facts constituting the criminal activities, evidence for which the search was authorized. The warrant was issued for the search of company offices and the seizure of a broad group of documents which allegedly showed violations of federal law. The court noted that the warrant was overbroad on its face: "It does not constitute a constitutionally adequate particularization of the items to be seized." *Id* at 601 (internal quotations, citations, and alterations omitted).

The Ninth Circuit recently outlined the reasons for attachment of the search warrant affidavit to the warrant itself: " . . . we require affidavits to accompany warrants not only in order to limit officers' discretion in conducting the search, but also in order to 'inform the person subject to the search what items the officers executing the warrant can seize,'" *United States v. Grubbs*, 377 F.3d 1072, 1077 (9th Cir. 2004)(citations omitted). *See also United States v. Maxwell*, 920 F.2d 1028, 1032 (D.C. Cir. 1990) ("Although there is little case law specifically addressing what suffices to incorporate an affidavit into a warrant by reference, we

believe that something more is required than a boilerplate statement that the affidavit or affidavits presented to the magistrate constitute probable cause for issuing the warrant."). *United States v. George*, 975 F.2d 72, 76 (2nd Cir. 1992) ("Resort to an affidavit to remedy a warrant's lack of particularity is only available when it is incorporated by reference in the warrant itself and attached to it"); *United States v. Bridges*, 344 F.3d 1010 (9th Cir. 2003) (overbroad warrant not cured by affidavit that was neither incorporated by reference nor attached to warrant).

In this case, the affidavit was sealed and therefore was not attached to, and did not accompany, the warrants. Thus it could not have limited the scope of the agents search, as in *Groh.*

The use of such terms as "all illegal activities" in a search warrant has been universally condemned by the courts. *See United States v. Johnson*, 690 F.2d 60 (3rd Cir. 1982) (language of warrant authorizing search for evidence of "a crime" overbroad); *United States v. Bridges*, 344 F.3d 1010 (9th Cir. 2003) (warrant authorizing search for "evidence of crimes" followed by generic list of items to be seized such as "records," "documents," and "computers" overbroad).

The Third Circuit resisted the almost unanimous conclusion of its sister circuits by making two fundamental errors. First, it tried to limit the broad scope of the terms all "illegal business activities" and all "illegal activities" by twisting the words of the warrant and claiming that the terms "illegal activities" were specifically "defined" by some limiting language elsewhere in the warrant. The Court claimed:

> In Exhibit B, paragraph a., "illegal business activities" is defined as "Money Laundering and Conspiracy to Commit Money Laundering, Failing to Report Exporting of Monetary Instruments, Mail Fraud, Wire Fraud, Alien Smuggling, Food Stamp Fraud, and Conspiracy." (App.402.) Thus, unlike the term "crime" in *Andresen,* which the Court had to view in context to determine that it referred to the crime of false pretenses, the term "illegal business activities" is specifically defined in the warrant. (App. 44-45)

The Third Circuit's tortuous reading of the warrant is impossible to credit. The warrant does not say, as the Court claims, that the agents were authorized to search for "illegal business activities, *which is defined* as money laundering" and the other crimes listed. It says the opposite: It authorizes the seizure of "Any and all records ... of *money laundering and illegal business activities*, including Money Laundering " and other crimes. The relation between "illegal business activities" and "money laundering" is not that one defines the other; they are listed as parallel "crimes," each of which can be the basis for a search. If one follows the natural reading of the warrant, it falls squarely within the prohibition of general warrants.

Second, the Circuit relied upon two cases that are easily distinguished from this case: *Andresen v. Maryland,* 427 U.S. 463 (1976) and the Third Circuit's prior decision in *United States v. Kepner,* 843 F.2d 755 (3rd Cir.1988).

In *Andresen,* warrants were issued to search for evidence of a single, allegedly fraudulent real estate

transaction. Defendant had agreed that, for the most part, the warrants were "models of particularity" but argued "they were rendered fatally 'general' by the addition, in each warrant, to the exhaustive list of particularly described documents, of the phrase 'together with other fruits, instrumentalities and *evidence of crime* at this (time) unknown'" (emphasis added). 427 U.S. 479. Defendant argued that the underscored language authorized a general search for evidence of "any crime" whatsoever. This Court disagreed, finding that this language could not be read in isolation and that the "term 'crime' in the warrants refers only to the crime of false pretenses with respect to the sale of Lot 13T." 427 U.S. at 479. This interpretation was plausible in the context of warrants unquestionably issued to search for evidence of a single crime involving a single transaction.

Similarly, in the *Kepner* case, discrete crimes were under investigation, namely a violation of the Taft Hartley law by a union official accepting benefits from an employer and mail fraud connected with the Taft Hartley violation. Under those narrow circumstances, the search for all "documents, records, and personal effects" found in a single condominium inhabited by the official was not overbroad. This Court explained that "any evidence of Kepner's presence in the condominium on a regular basis could be evidence of a violation of the statute." 843 F.2d at 762-63. (emphasis added)

Here, by contrast, warrants were issued to search for evidence of at least eight crimes allegedly committed over a period of more than ten years, as well as evidence of any other "illegal business activity." The list of crimes included generic mail

fraud and wire fraud crimes as well as conspiracy to commit any of the listed crimes, extremely broad statutes that did not significantly limit the search for material that could be relevant evidence. This case did not involve a single transaction or benefits paid to a single union officer. While the limitation read by this Court into the language "evidence of crime" followed naturally from the very limited nature of the warrants there in issue, no such conclusion may be reached here. On the contrary the offending language here -- records of any "illegal activity" -- must be read as a natural extension of the warrants' already broad language that permitted a search into any evidence of any "illegal business activity."

The two terms define and reinforce each other's broad mandate. The warrant here was a general warrant prohibited by the Fourth Amendment.

B. The Failure to Identify the Specific Statutes Alleged to Have Been Violated Contributed to the Warrant's Over-breadth.

The absence of particularization in these warrants is exacerbated by their authorization to search for and seize evidence of crimes such as "money laundering ...mail fraud [and] wire fraud" -- all three of which are generic offenses derivative of other (here unspecified) criminal conduct. The mail fraud statute, for example, criminalizes virtually any "scheme or artifice to defraud" if a mailing is involved (*see* 18 U.S.C. § 1341) and the wire fraud statute covers similarly broad ground where wire communications are used (*see* 18 U.S.C. § 1343). The money laundering statutes, 18 U.S.C. §§ 1956 and 1957, are complex provisions that proscribe certain transactions

in the proceeds of "specified unlawful activity" a term that encompasses literally dozens of underlying offenses. *See* 18 U.S.C. § 1956 (c)(7).

It would have been bad enough had the warrants only cited the statutory text and section numbers for each enumerated crime without an accompanying factual recitation; in fact, however, the warrants do no more than allude to each crime by its generic name, such as "mail fraud" or "money laundering." The agents therefore not only were provided no guidance with respect to the factual scenarios that underlay the crimes, evidence of which they were authorized to find, but they were not even told definitely what those crimes were, or even their location within the United States Code.

Numerous cases note that the use of such broad language in a search warrant violates and undermines the Fourth Amendment's particularity requirement. *See Rickert v. Sweeney*, 813 F.2d 907, 909 (8th Cir. 1987) (a warrant's factual statement, limited only by references to the general conspiracy and tax evasion statutes, did "not limit the search in any substantive manner"); *United States v. Spilotro*, 800 F.2d 959 (9th Cir. 1986)(warrant for records, documents, cash and other items which were evidence of any of 13 listed federal statutes impermissibly broad); *Voss v. Bergsgaard*, 774 F.2d 402 (10th Cir. 1985) (overbroad warrant authorizing seizure of various categories of documents pertaining to conspiracy to defraud government); *United States v. Cardwell*, 680 F.2d 75, 77 (9th Cir. 1982) (warrant for business documents referencing to violation of general tax evasion statute insufficiently particularized); *United States v. Abrams*, 615 F.2d 541, 543 (1st Cir. 1980) (warrant for "certain

business and billing and medical records" showing actual and "fraudulent services" alleged to have been performed in a scheme to defraud the United States and submit false Medicare and Medicaid claims in violation of 18 U.S.C.§ 1001, overbroad)); *In re Lafayette Academy*, 610 F.2d 1, 3 (1st Cir. 1979)(overbroad warrant allowed "seizure of most every sort of book or paper ... 'limited only by the qualification that the seized item be evidence of violations of 18 U.S.C.§§ 286, 287, 371, 1001, 1014'").

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Dated: December 22, 2006 _____

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APPENDIX A

United States Court of Appeals, Third Circuit

UNITED STATES OF AMERICA; GOVERNMENT OF THE VIRGIN ISLANDS
v.

FATHI YUSUF MOHAMMED YUSUF, a/ka FATHI YUSUF; WALEED MOHAMMED HAMED, a/k/a WALLY HAMED; WAHEED MOHAMMED HAMED, a/k/a WILLIE YUSUF; MAHER FATHI YUSUF, a/k/a MIKE YUSUF; ISAM MOHAMAD YOUSUF, a/k/a SAM YOUSUF and UNITED CORPORATION, dba Plaza Extra Supermarkets, and NEJEH FATHI YUSUF

No. 05-3484
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

461 F.3d 374;

May 11, 2006, Argued
August 24, 2006, Filed

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JUDGES: Before: FISHER, COWEN and ROTH, * Circuit Judges.

* The Honorable Jane R. Roth assumed senior status on May 31, 2006.

OPINION BY: FISHER

OPINION:

OPINION OF THE COURT

FISHER, *Circuit Judge.*

Defendants, a Virgin Islands corporation and several of its owners and operators, were charged in a seventy-eight count indictment with various criminal offenses, including money laundering, currency structuring, tax violations, mail fraud, obstruction of justice, and conspiracy. n1 In connection with securing various search warrants, an FBI special agent submitted an affidavit that contained admittedly inaccurate information, which had been supplied by the Virgin Islands Bureau of Internal Revenue ("VIBIR") pursuant to a court order. The District Court held a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), and determined that certain statements in the affidavit were made with reckless disregard for the truth. The District Court then excised those statements from the affidavit and found that the reconstituted affidavit would have lacked probable cause. As a result, the District Court suppressed all of the evidence seized during the execution of the search warrants, effectively dismissing the Government's case.

> n1 There are seven defendants in this case: (1) United Corporation ("United"), a family-owned business located in the Virgin Islands that operates a chain of three Plaza Extra Supermarket stores in St. Thomas and St. Croix; (2) Fathi Yusuf, the primary shareholder of United; (3) Maher "Mike" Yusuf, Fathi's son, who is a part-owner of United and manager of one of the Plaza Extra stores; (4) Waheed "Willie" Hamed, Fathi's nephew, who manages the second Plaza

> Extra store; (5) Waleed "Wally" Hamed, Fathi's nephew and Waheed's brother, who manages the third Plaza Extra store; (6) Isam "Sam" Yousef, Fathi's nephew, who is a resident of St. Maarten, Netherlands Antilles, and owns and operates a retail furniture and appliances store; and (7) Nejeh Fathi Yusuf, Fathi's son, who is an owner and employee of United and who participated in the operation of the Plaza Extra stores.

We find that the disputed representations in the affidavit were not made with reckless disregard for the truth because the FBI agent did not have an "obvious reason to doubt the truth" of the information supplied by VIBIR. The District Court erred by failing to recognize that government agents should generally be able to presume that information received from a sister governmental agency is accurate. To demonstrate that a government official acted recklessly in relying upon such information, a defendant must first show that the information would have put a reasonable official on notice that further investigation was required. If so, a defendant may establish that the officer acted recklessly by submitting evidence: (1) of a systemic failure on the agency's part to produce accurate information upon request; or (2) that the officer's particular investigation into possibly inaccurate information should have given the officer an obvious reason to doubt the accuracy of the information. As we will explain herein, defendants in this case have failed to make this requisite showing, and, as a result, we find that the District Court erred in excising the disputed representations from the affidavit.

In addition, even assuming that portions of the affidavit should be excised, we conclude that the District

Court clearly erred in concluding that the reformulated affidavit lacked probable cause. The reformulated affidavit contained sufficient allegations of money laundering to provide probable cause to search the three grocery stores for specific types of corporate business records alleged to have been involved in the money laundering enterprise. It is clear that the District Court's [*379] analysis on this point cannot be supported by the record. Furthermore, the warrant does not fail as an unconstitutional general warrant. The listing of the corporate items to be searched in the warrant application was not unconstitutionally overbroad, particularly considering this Court's repeated pronouncements to give greater flexibility in making the probable cause determination in the context of large-scale, document-intensive corporate offenses.

For these reasons, we will reverse the decision of the District Court and remand the case for further proceedings consistent with this opinion.

I.

In seven deposits made between April 16-19, 2001, United placed $ 1,940,000 in currency in $ 50 and $ 100 denominations into its account with the Bank of Nova Scotia (the "Bank"). (App. 408). Because this activity was inconsistent with United's normal business banking activity, the Bank generated a Suspicious Activity Report on May 17, 2001, which was forwarded to the FBI's St. Thomas office on July 20, 2001. Based on that information, the FBI immediately opened a criminal investigation to investigate, *inter alia*, possible money laundering violations. (*Id.*) Federal grand jury subpoenas were issued to the Bank in mid-August 2001, and the Bank began producing documents relating to United's operating account on August 31, 2001. (*Id.*)

The FBI's investigation culminated several weeks later in an application for search warrants submitted to a magistrate judge. n2 That application contained a sworn affidavit that detailed, in thirty-six numbered paragraphs and two exhibits, the Government's investigation to that point. The affidavit contained some background information regarding past immigration violations at the Plaza Extra stores. In 1999, United paid a $ 20,000 fine to settle an administrative proceeding brought by the Immigration and Naturalization Service (INS) n3 regarding its failure to fill out employee I-9 forms. Also in 1999, Fathi Yusuf pled guilty to three counts of unlawful employment of unauthorized aliens; he was subsequently sentenced in September 2001 to six months of house confinement. During that investigation, INS agents who searched the supermarkets found large amounts of U.S. currency inside the safe of one of the stores. A manager of the store who opened the safe told the agents that the money, which was in denominations of $ 50 and $ 100, totaled between $ 3 million and $ 7 million. Bank records obtained in the investigation revealed that United never made any large-scale currency deposits of that magnitude in 1999. (App. 395.)

> n2 The application, filed October 19, 2001, sought warrants for the following locations and persons: (1) the Plaza Extra Supermarket in St. Thomas; (2) the Plaza Extra Supermarket in Frederiksted, St. Croix; (3) the Plaza Extra Supermarket in Christiansted, St. Croix; (4) Fathi Yusuf's residence in St. Croix; (5) Waleed Yusuf's residence in St. Croix; (6) Waheed Yusuf's residence in St. Thomas; (7) the persons of Fathi Yusuf, Waleed Hamed, and Waheed Hamed; and (8) two safe deposit boxes in Maher Yusuf's

name at the Bank of Nova Scotia in St. Croix. (App. 379.)

n3 On March 1, 2003, the INS ceased to exist as an agency of the Department of Justice. Pursuant to the Homeland Security Act of 2002, the enforcement functions of the INS were transferred to the Department of Homeland Security, Bureau of Immigration and Customs Enforcement ("BICE"). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 441, 116 Stat. 2135, 2192.

The affidavit also utilized the financial records provided by the Bank to profile United's average currency deposits over an eighty-seven week period between January 2000 and August 2001, which reflected a pattern of currency deposits of $ 300,000 to $ 500,000 per week. During that time span, currency deposits dipped below $ 300,000 on five occasions, the lowest total cash deposit being $ 140,000. (App. 396.) In contrast, nineteen weekly deposits exceeded$ 614,000, and seven of those deposits exceeded $ 920,000, which FBI Special Agent Thomas Petri, the FBI agent in charge of the investigation, characterized as "excessive when compared to the normal currency deposit pattern of United Corp." (*Id.*) n4

n4 According to the affidavit, criminals with large amounts of cash often seek out money launderers to conceal the source of funds realized through criminal activity. The affidavit states that money launderers are typically individuals who are in a position to deposit large amounts of cash into banks without suspicion --

such as bars, restaurants, liquor stores, and supermarkets. (App. 392.)

The affidavit focused in detail on the deposits made during the week ending April 21, 2001. According to the affidavit, the seven cash deposits made between April 16 and 19 were inconsistent with the normal pattern of deposits made by United in three respects: (1) the large total amount of $ 1.94 million deposited over a four-day period; (2) the fact that the deposits consisted solely of $ 50 and $ 100 bills; and (3) the fact that each deposit slip was marked "Cash (Stockholder's Investment)." (App. 396.) Moreover, the deposits themselves contained certain similarities. Each deposit was made in rounded amounts: $ 225,000, $ 250,000 (2 deposits), $ 300,000 (3 deposits), and $ 315,000. Although each of the deposits was made between April 16 and 19, the deposit slips were filled out in advance, dated April 12 through 19. According to the affidavit, all of this information "strongly implie[d] that the $ 1,940,000 cash was originally structured into smaller deposit amounts in order to create an appearance of deposits more consistent with the normal business activity, as opposed to a one-time cash deposit." (App. 397.)

The affidavit further noted that United issued two checks totaling $ 1.9 million to "Hamdan Diamond Corp." on August 17 and 19, 2001. The checks were signed by Waleed Hamed and marked "loan payment" and "partial payment" respectively. Hamdan is a retail business located in St. Maarten, Northern Antilles, owned in part by Fathi Yusuf. The affidavit noted that Fathi Yusuf is the sole signatory of Hamdan's Virgin Islands account, and that Hamdan shares the same Virgin Islands post office box as United. Moreover, the affidavit recounts information from a purportedly reli-

able foreign services agency which stated that Fathi Yusuf was a member of a network of Middle Eastern merchants who had made cash deposits in St. Maartens in 2000 in excess of $ 2.2 million. The agency told the FBI that these cash deposits were consistent with money laundering because "the amount of cash deposited appeared to far exceed the legitimate cash proceeds of their retail sales in St. Maartens." (App. 398.)

In addition, the affidavit contained information purportedly from three reliable confidential informants and one anonymous source. The first confidential source ("CS # 1"), who had purportedly provided the Government with reliable information in the past, told the FBI that [**10] a known drug trafficker was in direct contact with the management of Plaza Extra in order to launder drug proceeds through the supermarket. A second confidential informant ("CS # 2") informed the FBI that Waheed Hamed illegally purchased food stamps from stores owned by persons of Middle Eastern descent who were not authorized to collect reimbursements, in violation of federal law. In addition, a third confidential source ("CS # 3"), who the affidavit stated was willing to testify, told the FBI that Waleed Hamed had arranged to smuggle more than $ 2 million in U.S. currency in Muslim robes to Sadaam Hussein during the first Persian Gulf War. CS # 3 also described a conversation with Fathi Yusuf in which he said that "[a]ny man who can't take out $ 1 million a year in cash from a businesslike this is a fool." (App. 399.) Finally, the affidavit stated that the FBI received an anonymous phone call on October 12, 2001, in which the caller stated that the Yusuf had contacted a pilot, who had been previously convicted of alien smuggling, to transport two separate shipments of U.S. currency totaling $ 2.1 million from St. Thomas

to St. Maarten. According to the caller, the money was destined for Afghanistan.

The portion of the affidavit upon which the parties have focused in this appeal are the allegations of tax fraud made in paragraphs 23 and 24. The Government now concedes that these allegations were inaccurate. n5 After receiving United's bank records, the Government moved the District Court to grant an ex parte order compelling VIBIR to produce United's tax returns based on the Employer Identification Number (EIN) listed in the Suspicious Activity Report. The District Court signed the order on September 21, 2001, and VIBIR began producing records in October 2001. VIBIR initially provided the Government with a copy of United's 1998 U.S. corporate income tax return and computer transcripts reflecting the gross receipts reported by United on monthly Virgin Islands returns filed during 1999 and 2000. n6 United's 1998 U.S. corporate tax return reported gross receipts of approximately $ 41 million for 1998. In contrast, the computer transcripts provided by VIBIR reflected that United had reported gross receipts of $ 270,000 in 1998. (App. 672-73.) Thus, for the year 1998, there appeared to be a difference of over $ 40 million between the gross receipts reported on the 1998 U.S. corporate tax return and the 1998 Virgin Islands gross receipts returns. In addition, computer transcripts provided by VIBIR reflected that United reported gross receipts of $ 3.7 million in 1999 and $ 8.3 million in 2000. The Government, however, had copies of loan documents that United had furnished to the Bank in February 2000, stating gross receipts of approximately $ 47 million in 1999 and forecasting gross receipts of $ 54 million for 2000. (App. 397.)

n5 Paragraph 23 of the affidavit alleged that United had underreported its tax obligations, substantially inflated its revenues in connection with a loan application, and failed to file U.S. corporate income tax returns in 1999 and 2000. Paragraph 24 of the affidavit relied upon the allegations set forth in paragraph 23 to allege that United had submitted false financial statements to the Bank of Nova Scotia's headquarters in Toronto, in violation of various provisions of federal law. (App. 397-98.)

n6 In the Virgin Islands, a 4% gross receipts tax is imposed on retail businesses. Businesses such as United are required to file a monthly gross receipts tax return. (App. 534.)

VIBIR did not produce United's 1999 and 2000 U.S. corporate tax returns, and, prior to the time that the Government filed an application for the search warrant, VIBIR officials repeatedly informed the FBI agents investigating the case that United had not filed corporate tax returns for 1999 and 2000. (App. 397, 552-53.) Those representations turned out to be inaccurate. VIBIR later learned that United's tax returns were maintained under more than one EIN, and the agency conceded that it mistakenly did not produce all of the documents requested under the ex parte order. These tax returns, uncovered after a search of the Plaza Extra stores, revealed that United had reported $ 39,120,091 in gross receipts in 1998, as opposed to the $ 270,000 reflected on the computer printouts; $ 43,967,171 on its 1999 returns; and $ 49,211,159 on its 2000 returns. In addition, the search yielded United's U.S. corporate tax returns from 1998 through 2000. When all of these documents were uncovered, it became clear that the

search warrant affidavit erroneously set forth that United underreported its income on the Virgin Islands gross receipts returns by $ 54 million, when in actuality the alleged difference was $ 7,159,580. (*See* Goverment's Br. at 12-13.)

B.

The grand jury handed down the original indictment in this case on September 18, 2003. On September 9, 2004, the grand jury returned a seventy-eight count superseding indictment that charged defendants with various federal criminal offenses. Thereafter, defendants filed a motion to suppress evidence, or in the alternative a motion for a *Franks* hearing, to determine whether Agent Petri made knowingly false or reckless misrepresentations in the affidavit of probable cause. After extensive briefing from both parties, an evidentiary hearing, and oral argument, the District Court found that Agent Petri had made the false statements in paragraphs 23 and 24 with reckless disregard for the truth.

The District Court then reformulated the affidavit, striking out paragraphs 23 and 24. The District Court concluded that, without those paragraphs, the affidavit did not contain sufficient allegations to establish probable cause that defendants engaged in money laundering. It stated that the allegations regarding the discovery of $ 7 million in a safe during a raid of the St. Thomas Plaza Extra store in 1999 did not support an inference that United was laundering money, but rather that an equal inference could be drawn that United was "holding the money for some other legal purpose -- such as paying vendors or cashing customer's and employee's checks. . . . If anything, this tends to show that the money viewed in the safe in 1999 was periodically deposited between January2000 and August 2001, con-

troverting the Affiant's money laundering insinuation." (App. 20.) The District Court also dismissed the evidence of currency deposit fluctuations throughout the course of 2000 and 2001, explaining that the currency fluctuations and the checks to Hamdan could have been to repay a loan. Finally, the District Court dismissed the allegations in paragraph 25 regarding the $ 2.2 million deposited by the middle eastern merchants in St. Maarten as vague because the warrant affidavit did not "indicate what evidence would likely be found in the locations to be searched that would prove or disprove that Fathi Yusuf deposited money in St. Maarten as part of a money laundering scheme." (App. 21.) Notably, the District Court did not even bother to address in its opinion the fact that the money was deposited solely in $ 50 and $ 100 denominations.

As a result of these findings, the District Court suppressed all of the evidence that was obtained as the fruits of the search warrants. This decision effectively dismissed the Government's case. The Government appealed. n7

> n7 The District Court had original jurisdiction over the charged offenses pursuant to 18 U.S.C. § 3231 and 48 U.S.C. § 1612. We have appellate jurisdiction over the Government's appeal from a final order of the District Court suppressing evidence pursuant to 18 U.S.C. § 3731 and 28 U.S.C. § 1294(3).
>
> Also pending before this court is a motion to remand the case to the District Court to augment the record regarding Agent Petri's alleged recklessness. In a separate order issued today, we deny that motion without prejudice to defendants' right to bring additional motions before the District Court if relevant to the matter at

hand and not inconsistent with this opinion. We note, however, that our decision in Part II.C of this opinion likely moots any further motion brought to challenge Agent Petri's bad faith since the reformulated affidavit contained probable cause to search the United grocery store locations for corporate business records.

II. A.

The Warrant Clause of theFourth Amendment to the United States Constitution provides in pertinent part that "no Warrants shall issue but upon probable cause, supported by Oath or affirmation." U.S Const. amend. IV. It has been referred to by the Supreme Court as the "bulwark of Fourth Amendment protection." *Franks v. Delaware*, 438 U.S. 154, 165, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

In *Franks*, the Supreme Court determined that a criminal defendant has the right to challenge the truthfulness of factual statements made in an affidavit of probable cause supporting a warrant subsequent to the ex parte issuance of the warrant. There, the Court created a mechanism to allow a defendant to overcome the general presumption that an affidavit of probable cause supporting a search warrant is valid. First, the defendant must make a "substantial preliminary showing" that the affidavit contained a false statement, which was made knowingly or with reckless disregard for the truth, which is material to the finding of probable cause. *Id.* at 171. n8 At the hearing, the defendant must ultimately prove by a preponderance of the evidence that: (1) that the affiant knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant; and (2) that such statements or

omissions were material, or necessary, to the probable cause determination. *Sherwood v. Mulvihill*, 113 F.3d 396, 399 (3d Cir. 1997) (citing *Franks*, 438 U.S. at 171-72).

> n8 In order to make this preliminary showing, the defendant cannot rest on mere conclusory allegations or a "mere desire to cross-examine," but rather must present an offer of proof contradicting the affidavit, including materials such as sworn affidavits or otherwise reliable statements from witnesses. *Id.* The parties in this case do not dispute that a *Franks* hearing was appropriate based upon the information submitted by the defendant.

The Supreme Court in "*Franks* gave no guidance concerning what constitutes a reckless disregard for the truth in fourth amendment cases, except to state that 'negligence or innocent mistake [is] insufficient.'" *Wilson v. Russo*, 212 F.3d 781, 787 (3d Cir. 2000) (quoting *United States v. Davis*, 199 U.S. App. D.C. 95, 617 F.2d 677, 694 (D.C. Cir. 1979)). In *Wilson*, we set forth standards to identify what constitutes "reckless disregard for the truth" regarding both misstatements and omissions:

> In evaluating a claim that an officer both asserted and omitted facts with reckless disregard for the truth, we hold that: (1) omissions are made with reckless disregard for the truth when an officer recklessly omits facts that any reasonable person would want to know; and (2) assertions are made with reckless disregard for

> the truth when an officer has obvious reasons to doubt the truth of what he or she is asserting.

Id. at 783. The latter standard is similar to the actual malice standard set forth in First Amendment defamation claims. *Id.* at 788.

In the end, the defendant must prove by a preponderance of the evidence that probable cause does not exist under the corrected affidavit, i.e., that the deficiency in the affidavit was material to the original probable cause finding. *Id.* We have recognized a distinction between misrepresentations and omissions for purposes of determining whether deficiencies in the affidavit are "material." When faced with an affirmative misrepresentation, the court is required to excise the false statement from the affidavit. In contrast, when faced with an omission, the court must remove the "falsehood created by an omission by supplying the omitted information to the original affidavit." *Id.* at 400.

If the defendant is able to ultimately meet this burden, "the Fourth Amendment requires that . . . the fruits of the search [must be] excluded to the same extent as if probable case was lacking on the face of the affidavit." *United States v. Frost*, 999 F.2d 737, 743 (3d Cir. 1993) (quoting *Franks*, 438 U.S. at 156).

B.

Our task in the present case is to determine whether the District Court erred in finding that the misstatements in paragraphs 23 and 24 of the affidavit were made recklessly. It is clear from the record that the FBI had some concerns regarding the discrepancies between the 1998 U.S. corporate tax return and the 1998

Virgin Islands gross receipts return, as well as the figures it had for United's gross receipts returns it received from VIBIR for 1999 and 2000. Agent Petri submitted an affidavit that he "returned to the VIBIR offices on multiple occasions in an attempt to determine a reason for the large discrepancies." (App. 409.) Although the VIBIR disclosure officer was unable to explain the reasons for the discrepancies, Agent Petri claimed that "[o]n each visit I was assured that the United Corporation gross receipt tax information previously provided pursuant to the Ex Parte order were [sic] complete for United Corporation, dba Plaza Extra." (App. 409.) In addition, Agent Petri designated one of his agents, John Ware, as a liaison to report to VIBIR on a "daily basis . . . to collect all documents that were requested in the ex parte order." (App. 537.) VIBIR officials repeatedly assured the FBI that the gross receipts figures reported on the computer transcripts reflected the information submitted in the actual returns. Despite these repeated assurances, the District Court viewed Agent Petri's inability to obtain a satisfactory explanation from VIBIR as indicative of recklessness. (App. 25.)

The District Court also focused on the fact that Petri did not obtain an additional court order or subpoena United, any of the individual defendants, or United's accountant to obtain United's underlying gross receipts tax returns for 1998 through 2000 and the U.S. corporate tax returns for 1999 and 2000. Petri explained at the *Franks* hearing that he did not request such information from defendants prior to the search so as not to compromise the ongoing criminal investigation, and that a further court order would have been futile because the District Court had already entered the ex parte order. (App. 538, 553.)

We find that the District Court erred in concluding that the statements in the affidavit were made recklessly, particularly because the District Court did not take into account the nature and source of the information obtained by Agent Petri. Courts have routinely recognized a distinction between information provided by an informant and that provided by a law enforcement officer or other government agency. Informants are not presumed to be credible, and the government is generally required to show by the totality of the circumstances either that the informant has provided reliable information in the past or that the information has been corroborated through independent investigation. *See, e.g., United States v. Ritter*, 416 F.3d 256, 263 (3d Cir. 2005) ("Where corroboration or independent investigation after receipt of an anonymous tip is lacking -- and thus the predictive value of the tip goes untested before a warrant is issued -- courts have found officers' subsequent reliance on the warrant unreasonable."). In contrast, information received from other law enforcement officials during the course of an investigation is generally presumed to be reliable. *See United States v. Ventresca*, 380 U.S. 102, 111, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965) ("Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number."); *United States v. Hodge*, 354 F.3d 305, 311 (4th Cir. 2004) ("[S]tatements of other law enforcement officers 'are plainly . . . reliable' even without any special showing.") (citation omitted); *United States v. Meade*, 110 F.3d 190, 193 (1st Cir. 1997) ("[L]aw enforcement officials cooperating in an investigation are entitled to rely upon each other's knowledge of facts when forming the conclusion that a suspect has committed or is committing a crime."); *United States v. Davis*, 557 F.2d 1239, 1247 (8th Cir.

1977) (finding that a DEA agent was entitled to rely upon information provided to him by a Minneapolis police officer in submitting an affidavit for probable cause). n9

> n9 We recognize the line of cases beginning with *Whiteley v. Warden*, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971), which hold that reliance upon another officer's assertion that probable cause exists to make an arrest does not determine conclusively whether the arrest was legal. *See id.* at 568 (stating that "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest"). We are faced with a different analysis in this case. Here, the focus is on Agent Petri's mental state when he submitted the affidavit to the magistrate judge, not "whether the law enforcement system as a whole has complied with the requirements of the Fourth Amendment." 2 LaFave, *Criminal Procedure*, § 3.3(e) (2d ed. 1999).

The present case deals with information supplied by a sister governmental agency pursuant to court order. Under these circumstances, we believe that a flexible standard, taking into consideration the inherent reliability of the information provided by sister governmental agencies, as well as the possibility that such agencies might respond to a court order with inaccurate information, should be applied to determine whether a government agent acted recklessly by including specific information in an affidavit of probable cause. Certainly, information received from another governmental agency may raise questions as to its accuracy and require an agent to undertake further investigation, and we explicitly decline to adopt a rule that

information obtained from a sister governmental agency pursuant to a court order is *per se* reliable. Rather, we conclude that a defendant is required to demonstrate initially that the information provided by the agency would have put a reasonable official on notice that further investigation was necessary. If the defendant can meet this initial burden, the defendant must point to additional objective factors, suggesting that the agent's subsequent inquiry would have rendered the agent's reliance upon that information unreasonably reckless.

In this case, it is clear that the discrepancy between United's 1998 U.S. corporate income tax return, which reported income of approximately $ 41 million, and United's 1998 monthly gross receipts, which totaled $ 270,000, would have placed a reasonable official on notice that further investigation was necessary. A difference of over $ 40 million in reported earnings is so excessive as to cause a reasonable person to search for corroboration and an explanation. Indeed, Agent Petri conceded as much at the *Franks* hearing, and the Government has focused our attention in this case on Agent Petri's subsequent investigation in support of its argument that his actions were not reckless.

The fact that further investigation was required, however, does not demonstrate recklessness. In the context of a sister agency's response to a court order, the substance of an agent's particular investigation is pertinent as to whether the agent's insertion of an inaccurate allegation into the affidavit of probable cause was reckless. We find two factors to be particularly helpful to address this inquiry: (1) whether a reasonable agent would have been aware of a systemic failure on the agency's part to produce accurate information upon request; and (2) whether the agent's particular

investigation into possibly inaccurate information would give rise to an obvious reason to doubt the accuracy of the information.

The first factor focuses on external considerations independent from the particular facts of the ongoing investigation. Such considerations include, *inter alia*, whether the agent is aware that the agency has a history of providing inaccurate information to the investigating agent or other officers, and whether the agency lacks necessary procedural safeguards to ensure that the information it provides is accurate. The second factor focuses on the particular investigation conducted by the agent in the face of information that a reasonable officer would realize required further inquiry regarding its accuracy. Considerations under this factor may include the quality of the agent's attempts to validate the information, the source and nature of the information requested, and whether there exists a reasonably plausible explanation for the information provided by the governmental agency.

Applying each of these factors to the present case, we conclude that Agent Petri did not act recklessly by including paragraphs 23 and 24 in the affidavit. As an initial matter, we disagree with the District Court's belief that Agent Petri's lack of prior experience with VIBIR should be viewed as indicative of recklessness. To the contrary, it demonstrates that Agent Petri was unaware of any reason to doubt the accuracy of information provided by VIBIR pursuant to a court order. When combined with evidence that no other agents in Petri's field office, nor any prosecutor in the United States Attorney's Office, had ever dealt with or encountered problems with the accuracy of VIBIR gross receipts printouts, the record is devoid of any systemic

failure on VIBIR's part to provide accurate information upon request.

Moreover, the evidence presented to the District Court does not lead us to conclude that Agent Petri's particular investigation into the possibly questionable information gave rise to an obvious reason to doubt that the information was correct. Here, Agent Petri undertook a thorough investigation to determine whether VIBIR provided accurate information in response to the ex parte order. Agent Petri personally met with the VIBIR disclosure officer on several occasions in an effort to explain the discrepancy. (App. 409, 537.) Agent Petri also met directly with the VIBIR director and sent Agent Ware to the VIBIR offices on an almost-daily basis to gather information contained in the ex parte order. (App. 551.) On repeated occasions, VIBIR assured Agent Petri that United only had one tax identification number, that all of United's returns shared the same number, and that the monthly gross receipts printouts were those provided by United. (App. 409, 536, 568-69.) When Petri inquired further regarding whether he could obtain the actual gross receipts returns, VIBIR told him that it was able only to produce the printouts. (App. 537.) As Agent Petri testified, "VIBIR insisted that . . . Plaza Extra, doing business as United Corporation, had not filed their taxes and they could not find their tax returns," going so far as to give Agent Petri a written certification that they were unable to uncover the returns. (App. 551, 555-56.) As a result, Agent Petri exhausted all reasonable investigatory options to corroborate the information that VIBIR provided. n10

> n10 We disagree with defendants that the Government was required to return to the District Court to obtain an order to enforce the pre-

> viously filed ex parte order. There is no evidence that VIBIR complied with the ex parte order in bad faith. Rather, it appears that sloppy record-keeping prevented the agency from uncovering the correct information. In addition, we agree with the Government that Agent Petri was not required to subpoena defendants or their agents directly to obtain the tax records in the face of an ongoing investigation into serious criminal allegations.

Additionally, the source and nature of the information requested and obtained by the Government provides further support for Petri's actions. VIBIR did not disclose United's tax records voluntarily, but rather was required to do so because of an independent court order. This fact is important, as it detracts from any possible allegations that VIBIR and the FBI colluded to produce false information in the affidavit. Nor did VIBIR initiate the investigation with the FBI, which helps allay concerns that VIBIR deliberately provided false information to the FBI to coverup bad faith or improper motive. *See*, *e.g.*, *Franks*, 438 U.S. at 163 n.6 (warning against the dangers of the police "insulat[ing] one officer's deliberate misstatement merely by relaying it through an officer-affiant personally ignorant of its falsity")(quoting *Rugendorf v. United States*, 376 U.S. 528, 533 n.4, 84 S. Ct. 825, 11 L. Ed. 2d 887 (1964)).

Finally, a review of the record reveals a reasonably plausible explanation for the incorrect information provided by VIBIR at the time that Agent Petri submitted the affidavit to the magistrate judge: that United had underreported its gross receipts to VIBIR for 1998 through 2000. Our review demonstrates that Petri un-

dertook his investigation with some skepticism, but that he and his fellow agents were assured at every possible investigatory avenue that the records provided by VIBIR were accurate. Agent Petri and his fellow officers did not simply "go through the motions," but diligently pressed VIBIR to ensure that the information was correct. Agent Petri testified at the *Franks* hearing that he attempted to disprove the validity of the figures provided by VIBIR. (App. 557.) After being assured repeatedly by VIBIR that the information was accurate, Agent Petri was left with the eminently plausible conclusion at that point in the investigation that United had underreported its gross receipts returns. That this information later turned out to be incorrect because of VIBIR's internal mistakes is not determinative, as we focus our analysis under *Franks* on whether a reasonable officer in Agent Petri's position would have had an obvious reason at the time he submitted the affidavit to doubt the accuracy of the information. No such reason existed in this case.

For all of these reasons, we find that the District Court erred by determining that the misstatements in paragraphs 23 and 24 were made recklessly by Agent Petri. n11

> n11 Defendants argue, and the District Court agreed, that Agent Petri omitted material information in the affidavit: namely, that he did not inform the magistrate judge that he was uncomfortable with the discrepancies in the data. We disagree. Agent Petri's purported omission consists of his alleged subjective misgivings regarding the quality of the information he received from VIBIR. A review of the affidavit reveals, however, that Agent Petri did not omit any material information in the affidavit, as paragraph 23

contains the discrepancy between the income tax filings and the gross receipts. Our cases dealing with purported material omissions have not recognized that an agent is required to set forth his subjective misgivings regarding information in the affidavit; rather, those decisions have focused on whether the agent recklessly omitted objective information that is material to the magistrate judge's determination of probable cause. *See Wilson v. Russo*, 212 F.3d 781, 791 (3d Cir. 2000) (omitting fact that eyewitness spotted defendant in a different location while a crime was ongoing); *Sherwood v. Mulvihill*, 113 F.3d 396 (3d Cir. 1997) (omitting fact that officer directed third-party to make drug purchase); *United States v. Frost*, 999 F.2d 737, 743-44 (3d Cir. 1993) (omitting fact that drug dog was not "alerted" to alleged courier's suitcase).

C.

The disconcerting part of our analysis of the District Court's decision is that the ultimate determination of whether the assertions in paragraphs 23 and 24 were made with reckless disregard for the truth is inconsequential. The reformulated affidavit clearly establishes probable cause to authorize the search warrants. n12 Even if this Court were to strike paragraphs 23 and 24 from the affidavit, there are sufficient factual allegations of money laundering to support a finding of probable cause to search the three Plaza Extra supermarkets for corporate business records.

n12 We note that it would be improper to reformulate the affidavit with the "correct" gross receipts figures reported in United's 1998 through 2000 Virgin Islands tax returns to show

a $ 7.16 million difference between what was reported on United's Virgin islands gross receipts returns and what was reported on its 1998 through 2000 U.S. corporate income tax returns. The Government contends that information allegedly indicating that United had underreported its gross income by $ 7.16 million would have established probable cause to issue the warrants. Defendants, in contrast, assert that it would be improper to reformulate the affidavit with the "corrected" figures because the Government would not be deterred by its own misconduct.

We agree with defendants. The purpose of *Franks* and its progeny is to deter law enforcement personnel from including recklessly false information in affidavits of probable cause. If an agent provides recklessly false information, the government should not get the benefit of the fortuitous circumstance that evidence obtained as a result of the defective search warrant *would have been sufficient* to establish probable cause had it been contained in the original affidavit. The Government's argument assumes that the tail can wag the dog, i.e., that we can consider the corrected information. This argument is flawed, however, because the magistrate judge is limited to the facts submitted in the affidavit in making a determination of probable cause. *United States v. Hodge*, 246 F.3d 301, 305 (3d Cir. 2001). Indeed, in reviewing whether the magistrate had a "substantial basis" to issue the warrant, we are limited to reviewing the affidavit and cannot "consider information from 28 other portions of the record." *Id.*; *see also United States v. Button*, 653 F.2d 319, 326 n.8 (8th Cir. 1981). If we were to "correct" the affidavit as suggested by

the Government, we would not only be infusing extraneous information into the probable cause determination, but we would also allow the Government to receive the benefit of its misconduct. *See Nix v. Williams*, 467 U.S. 431, 443, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984)(explaining that the purpose of the exclusionary rule is to ensure that "the prosecution is not put in a better position than it would have been in if no illegality had transpired"); *see also Baldwin v. Placer County*, 418 F.3d 966, 971 (9th Cir. 2005) (holding that a reformulated affidavit must be based upon information already contained in the warrant); 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 4.4(c) (4th ed. 2004) (stating that an affidavit that contains knowing falsehoods "should not be open to rehabilitation by a process of substituting for the affiant's lies other information which is really the truth from which he deliberately departed"). That result is not endorsed by *Franks*, which requires courts to "set to one side" the affirmative misstatements and determine whether the remaining information in the affidavit supports a finding of probable cause. 438 U.S. at 155; *see also Baldwin*, 418 F.3d at 971.

Additional information may be incorporated into an affidavit only if we determine that a government agent made a material omission. The reason for the distinction between omissions and misrepresentations is that an omission cannot be excised; rather, the omitted information is introduced into the affidavit in order to determine whether the omission was material. *See Sherwood*, 113 F.3d at 400. *See also* 2 LaFave, *su-*

> *pra*, § 4.4(c) (noting that the outcome in *Franks* challenges may turn on whether the defect is a material omission or a misstatement). Because the alleged misconduct in this case focuses on misstatements by a government agent, rather than omissions, we will not reformulate the affidavit with the "corrected" gross tax receipts information.

The redaction process set forth in *Franks* is designed to determine whether there existed a causal connection between the misrepresentation and the challenged search. *United States v. Calisto*, 838 F.2d 711, 715 (3d Cir. 1988). Essentially, the process helps us determine whether the misrepresentation was material, i.e., whether it mattered regarding the magistrate's probable cause determination. In this case, our focus is further narrowed based on the Government's representation that it is going to introduce in its case-in-chief only "evidence of business records seized . . . from the Plaza Extra store locations[.]" (Government's Br. at 50; App. 347.) n13 Because the Government is bound by its declaration that it will not use evidence in its case-in-chief seized from the other locations listed in the search warrants, we need not examine whether the search and seizure of items from those locations was supported by probable cause. n14 This course of action is commensurate with our existing precedent. In *United States v. Christine*, 687 F.2d 749, 753 (3d Cir. 1982), we held that where the evidence authorized to be seized exceeds the underlying probable cause justification, the proper course is for the court to redact that information from the affidavit of probable cause. We explained in *Christine* that:

> By redaction, we mean striking from a warrant those severable phrases and clauses that are invalid for lack of probable cause or generality and preserving those severable phrases and clauses that satisfy the Fourth Amendment. Each part of the search authorized by the warrant is examined separately to determine whether it is impermissibly general or unsupported by probable cause. Materials seized under the authority of those parts of the warrant struck for invalidity must be suppressed, but the court need not suppress materials seized pursuant to the valid portions of the warrant.

Id. at 754. Thus, our course in this case will mirror that taken in *Christine*, and we will consider the validity of the search warrant solely with respect to the corporate business records and cash seized from the three Plaza Extra stores.

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> n13 This evidence, seized from the supermarkets as a result of the search, "consists primarily of corporate business records," including: (1) financial records, such as general ledgers, financial statements, balance sheets, bank statements, checks, reconciliations, and payroll checks; (2) sales records, such as computer and handwritten records of company sales; credit card receipts; (3) tax records, such as income, gross receipt and employment tax returns; (4) purchase records, such as sales invoices and cash ledgers; and (5) cash found in the safes at the Plaza Extra locations. (*See* App. 348.)

> n14 As a result, the Government will be precluded from introducing during its case-in-chief any evidence seized from the following locations: Fathi Yusuf's principal residence in Christiansted, St. Croix; Waleed Hamed's residence in Christiansted, St. Croix; Waheed Hamed's residence in St. Thomas; the persons of Fathi Yusuf, Waleed Hamed, and Waheed Hamed; and the two safe deposit boxes in the name of Maher F. Yusuf in the Bank of Nova Scotia, St. Croix. (App. 391, 401.)

Our focus, then, is whether the reformulated affidavit established probable cause to search the three Plaza Extra Supermarkets. In conducting this analysis, we must examine the "totality of the circumstances" as set forth in the affidavit. *Ritter*, 416 F.3d at 262. Under this flexible standard, "the task . . . is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit[,] . . . including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 235, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). That determination does not require absolute certainty that evidence of criminal activity will be found at a particular place, but rather that it is reasonable to assume that a search will uncover such evidence. *Ritter*, 416 F.3d at 263; *see also United States ex. rel Campbell v. Rundell*, 327 F.2d 153, 163 (3d Cir. 1964) ("[P]robable cause which will justify the issuance of a search warrant is less than certainty of proof, but more than suspicion or possibility, the test being whether the allegations of the supporting affidavit warrant a prudent and cautious man in believing that the

alleged offense has been committed.") (citation omitted).

Both this Court and the United States Supreme Court have warned against the practice of "overly compartmentaliz[ing]" the determination of probable cause. *In re Application of Adan*, 437 F.3d 381, 397 n.7 (3d Cir. 2006). The probable cause determination is to be made only after considering the totality of the circumstances, which requires courts to consider the cumulative weight of the information set forth by the investigating officer in connection with reasonable inferences that the officer is permitted to make based upon the officer's specialized training and experiences. *United States v. Arvizu*, 534 U.S. 266, 275, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). In *Arvizu*, for example, the Supreme Court rejected the Ninth Circuit's approach of individually weighing and considering in isolation each of the factors relied upon by a government agent to stop a vehicle for possible immigration smuggling offenses. The Supreme Court explained that such an approach was inconsistent with a totality of the circumstances approach:

> The [Court of Appeals'] evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the "totality of the circumstances," as our cases have understood that phrase. The court appeared to believe that each observation by [the agent] that was by itself readily susceptible to an innocent explanation was entitled to "no weight." *Terry*, however, precludes this sort of divide-and-conquer analysis.

Id. at 274. n15

> n15 The fact that the Court's decision in *Arvizu* reviewed whether the agent had reasonable suspicion, as opposed to probable cause, to stop the vehicle is immaterial. We focus in this case on application the totality of the circumstances approach, which is used in both the determination of both probable cause, *United States v. Hodge*, 246 F.3d 301, 305 (3d Cir. 2001), and of reasonable suspicion, *United States v. Nelson*, 284 F.3d 472, 478 (3d Cir. 2002).

In this case, the District Court erroneously applied the divide-and-conquer approach rejected by the Supreme Court in *Arvizu* by examining each of the allegations in the affidavit *seriatim* rather than collectively. We conclude that the information set forth in the affidavit provides probable cause that evidence of money laundering would be found at the three Plaza Extra stores.

Agent Petri's affidavit alleged that United's principals made large currency deposits inconsistent with the corporation's usual business practices on several occasions between April 2000 to August 2001. Importantly, those deposits -- from a retail grocery chain -- were made *solely* in $ 50 and $ 100 denominations. We cannot understand why this critical fact was overlooked by the District Court. It is utterly incomprehensible that a retail supermarket chain receives and deposits cash only in such large denominations. n16 The nature of the business certainly entails receiving currency from customers in smaller denominations, and the absence of *any* smaller denominations deposited on these two

occasions makes it reasonable to assume that this money was not tied to legitimate grocery sales.

> n16 At oral argument, defendants' counsel attributed the large number of $ 50 and $ 100 bills deposited to extra cash brought in by the Carnival celebration that took place in the Virgin Islands during April 2001. Even assuming that the Plaza Extra stores generated greater revenues during Carnival, defendants failed to provide *any* viable explanation why the deposits were made solely in $ 50 and $ 100 bills.

This fact is compounded by the manner in which the April 2001 deposits were structured. Although cash deposit slips were made out in advance and dated for seven consecutive days between April 12 and April 18, the seven deposits were made over a four-day period. In addition, the deposits were made separately in similarly rounded amounts ($ 225,000, $ 250,000, $ 300,000, and $ 315,000) that more closely resembled normal deposits. Based on his twelve years of experience, as well as his specialized training in money laundering investigations, Agent Petri explained that this evidence strongly implied "that the $ 1,940,000 cash was originally structured into smaller deposit amounts in order to create an appearance of deposits more consistent with the normal business activity, as opposed to a one-time bulk deposit." (App. 397.)

Moreover, the information from the August 1999 INS search provides a useful historical reference point consistent with United's continuing practice of having large, unexplained amounts of cash in $ 50 and $ 100 denominations. *See, e.g., Ritter*, 416 F.3d at 263 (permitting court to consider agent's observation of narcot-

ics activity at the situs eight months earlier in the probable cause analysis because later search involved similar type of criminal narcotics offense). We disagree with defendants that the information relating to the August 1999 search, which uncovered $ 3 million to $ 7 million in denominations of $ 50 and $ 100 bills, was stale. Although the "[a]ge of the information supporting a warrant application is a factor in determining probable cause . . . [a]ge alone . . . does not determine staleness." *United States v. Harvey*, 2 F.3d 1318, 1322 (3d Cir. 1993). The facts and circumstances of each individual case must be considered. *Id.* We have noted generally that the mere passage of time does not render information in an affidavit stale where: (1) the facts suggest that the activity is of a protracted and continuous nature, *United States v. Tehfe*, 722 F.2d 1114, and (2) the items to be seized were created for the purpose of preservation, e.g., business records, *United States v. Williams*, 124 F.3d 411, 421 (3d Cir. 1997). *See United States v. Ninety-Two Thousand FourHundred Twenty-Two Dollars & Fifty-Seven Cents ($ 92,422.57)*, 307 F.3d 137, 148 (3d Cir. 2002) (holding that eleven-month gap between criminal activity and execution of the warrant did not render the affidavit stale because the relationship between the defendant and the criminal enterprise was "of considerable duration" and the warrant authorized a search for business records, which are typically retained for an extended period of time). In this case, the warrant application sought permission to search for United's corporate business records, which are likely be kept for a longer time period than other types of physical evidence due to general business and accounting practices. *See Christine*, 687 F.2d at 760. The August 1999 INS search, thus, provides a link between the alleged current criminal activity and similar activity that took

place over the preceding twenty months, suggesting a pattern of activity that was continuous in nature.

Finally, the affidavit lists several allegations that, when taken together with the unexplained currency deposits, provided probable cause for the magistrate judge to issue the search warrants. During the same period in which United was depositing the unusually large currency amounts in large denominations, Waleed Hamed signed two checks totaling $ 1.9 million on behalf of United payable to "Hamdan Diamond Corp." Hamdan is a retail business located in St. Maarten, Northern Antilles, owned in part by Fathi Yusuf, who is the sole signatory of Hamdan's account. n17 A reliable foreign services agency informed the FBI that its investigation had uncovered that Yusuf was part of a network of Middle Eastern merchants who owned retail businesses in St. Maarten. According to the agency, these merchants made cash deposits of over $ 2.2 million into their respective accounts in 2000, an amount far in excess of the legitimate cash proceeds of their retail sales. The foreign services agency concluded that the merchants were laundering U.S. currency through their retail businesses. When combined with this historical backdrop, the cash deposits in $ 50 and $ 100 bills and contemporaneous check to Hamdan suggest that United's activities in April 2001 were an attempt to launder cash proceeds through an offshore corporation in St. Maarten.

n17 Defendants contend that Hamdan Diamond Corporation is neither owned by Yusuf nor a St. Maarten retail business. That fact, however, was not challenged in the *Franks* hearing below. As a result, we accept the fact as true for

purposes of examining the reformulated affidavit of probable cause.

Based upon all of the allegations in the affidavit, considered *in toto*, a reformulated and redacted affidavit would establish probable cause for the Government to search for corporate business records at the three Plaza Extra stores. Thus, we would reverse the decision of the District Court even in the absence of our finding that the allegations in paragraphs 23 and 24 were not made recklessly.

III.

Apart from whether the warrants contained sufficient allegations to establish probable cause is the question of whether the warrants were drafted with sufficient particularity with respect to the property to be searched and the items to be seized. Defendants argue that any evidence the Government intends to introduce at trial should be suppressed in its entirety because the warrants were general warrants. n18 Defendants advance three arguments in support of this proposition: (1) the warrants do not state with particularity the property to be searched and seized; (2) the warrants fail to identify the crimes committed by reference to the statutory elements in the United States Code; and (3) the catch-all provision in the warrants, which allowed the agents to search for any evidence of "money laundering and illegal activities," unconstitutionally gave the agents unfettered discretion to conduct their search.

n18 Although the District Court did not reach the general warrant issue below because of its decision following the *Franks* hearing, we consider the issue at this time because the factual

> record is fully-developed and the purely legal question is necessary to our resolution of the appeal. *See Hudson United Bank v. LiTenda Mortgage Corp.*, 142 F.3d 151, 159 (3d Cir. 1998) ("When a district court has failed to reach a question below that becomes critical when reviewed on appeal, an appellate court may sometimes resolve the issue on appeal rather than remand to the district court. This procedure is generally appropriate when the factual record is developed and the issues provide purely legal questions, upon which an appellate court exercises plenary review.") (citations omitted).

The Fourth Amendment provides that warrants must "particularly describ[e] the place to be searched and the persons or things to be seized." U.S. Const. amend. IV (emphasis added). General warrants violate the Fourth Amendment because they essentially authorize "a general exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). For example, warrants requesting to search for the following materials have been struck down as general warrants: (1) evidence of "smuggled goods," *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886);(2) evidence of "obscene materials," *Marcus v. Search Warrant*, 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 (1961); (3) evidence of "books, records, pamphlets, cards, lists, memoranda, pictures, recordings, and other written instruments concerning the Communist Party of Texas," *Stanford v. Texas*, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965); (4) evidence of "illegally obtained films," *United States v. Cook*, 657 F.2d 730 (5th Cir. 1981); and (5) evidence of "stolen property," *United States v. Giresi*, 488 F.

Supp. 445 (D.N.J. 1980), *aff'd*, 642 F.2d 444 (3d Cir. 1981). Defendants' three arguments essentially contend that the warrants in this case violated the particularity requirement, giving government agents unfettered discretion to search the three Plaza Extra stores. n19

> n19 There is a legal distinction between a general warrant, which is invalid because it vests the "executing officers with unbridled discretion to conduct an exploratory rummaging through [the defendant's] papers in search of criminal evidence," and an overly broad warrant, which "'describe[s] in both specific and inclusive general terms what is to be seized," but "authorizes the seizure of items as to which there is no probable cause." *Ninety-Two Thousand Four Hundred Twenty-Two Dollars & Fifty-Seven Cents ($ 92,422.57)*, 307 F.3d at 149 (quoting *Christine*, 687 F.2d at 753-54). As discussed above, an overly broad warrant can be redacted to strikeout those portions of the warrant that are invalid for lack of probable cause, maintaining the remainder of the warrant that satisfies the Fourth Amendment. *Id.* In contrast, the only remedy for a general warrant is to suppress all evidence obtained thereby. *Id.* at 758 ("It is beyond doubt that all evidence seized pursuant to a general warrant must be suppressed.").

Defendants' first argument is that the warrants failed to incorporate the Petri affidavit and did not otherwise explicate the facts constituting the enumerated crimes. They argue that we should apply the Supreme Court's recent decision in *Groh v. Ramirez*, 540 U.S. 551, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004), to invalidate the search warrant because the affidavit in this case was not incorporated into the search warrant.

The facts in *Groh*, however, are clearly different from this case. In *Groh*, an ATF agent prepared and signed a detailed affidavit and application for a search warrant which stated that the purpose of the search was to find a number of illegal firearms. Although the application was extremely detailed and particularly described the place to be searched and the items to be seized, the warrant itself "failed to identify *any* of the items that [the agent] intended to seize." *Id.* at 554 (emphasis added). In addition, the warrant failed to incorporate by reference the list of items to be seized, which was enumerated in the application. *Id.* at 555. According to the Court, this defect was fatal: "The fact that the *application* adequately described the 'things to be seized' does not save the *warrant* from its facial invalidity." *Id.* at 557 (emphasis in original). The Court explained that a warrant may incorporate a supporting application or affidavit, so long as the warrant cross-references the supporting document and the document accompanies the warrant. *Id.* at 558.

From this holding, defendants contend that the warrant is invalid in our case because it did not incorporate the entire affidavit. The flaw in this argument, however, is that the warrant in this case did incorporate Exhibit B of the application, which was attached to each of the warrants. There is no question that the warrants in this case (like the warrant in *Groh*) particularly described the place to be searched. Unlike *Groh*, however, Exhibit B -- which specifically identified the items that the government intended to seize -- was also incorporated into the warrants. (*See* App. 380-82.) Had the same step been taken in *Groh*, the deficient warrant would have been remedied. Thus, the problem which existed in *Groh* is simply not implicated in this case.

Because Exhibit B was incorporated into the affidavit, the next question becomes whether that exhibit particularly described the items to be searched. Defendants argue that the government did not narrow the categories of evidence sought to be searched because the warrant authorized the search for violations of broad federal statutes, including money laundering and various frauds, that encompass a wide-range of criminal conduct. According to defendants, the reference to these statutes, without any further limitation, transformed the warrants in this case into general warrants.

Defendants cite principally to the Tenth Circuit's decision in *United States v. Leary*, 846 F.2d 592 (10th Cir. 1988), in which the court determined that a warrant was facially overbroad because it sought evidence of "the purchase, sale and illegal exportation of materials in violation of" federal export laws. *Id.* at 601. The principal failure of the warrant in that case was its singular reference to a broad federal statute without any meaningful limitations on the items to be searched. There, the government sought to search for records relating to the export of one product to China, and the government failed to include such limiting information in the warrant. *Id.* at 604.

In *United States v. American Investors of Pittsburgh*, 879 F.2d 1087 (3d Cir. 1989), a case similar to the present one, we distinguished the Tenth Circuit's decision in *Leary*. In that case, the government sought twenty-three categories of documents as evidence of money laundering. The defendants argued that the search was unconstitutionally overbroad. We disagreed, noting that a broad range of documents were required to be searched to "sort[] out the details of th[e] sophisticated scheme." *Id.* at 1106. We noted that "[t]he fact that the warrant authorized a search for a

large amount of documents and records does not necessarily render the search invalid so long as there exists a sufficient nexus between the evidence to be seized and the alleged offenses." *Id.* at 1105-06. We explained that the holding in *Leary* depended on the crucial fact that the government had information available "to make the description of the items to be seized much more specific." *Am. Investors*, 879 F.2d at 1106. Thus, in contrast to the warrant at issue in *Leary*, the warrant in *American Investors* was as specific as possible under the circumstances:

> Here, given the range of information required to unravel the laundering scheme and the extent of participation by the parties, the warrant was as specific as circumstances would allow, however broad the requirements of the search might be. We cannot see how any more precise language in the affidavit could have limited the scope of the search authorized by the magistrate, despite the fact that the language of the warrant was broader than that of the affidavit.

Id.

Similarly, in *United States v. Kepner*, 843 F.2d 755 (3d Cir. 1988), we held that a search warrant seeking "documents, records, and personal effects" of the defendants in connection with an investigation into violations of the Taft-Hartley Act was not impermissibly overbroad. The items listed to be searched in the warrant were broader than in the application, which stated that the agent had probable cause that the search would result in "the seizure of personal items of [the defen-

dant] such as clothing, documents, records, diaries, and correspondence that establish his use and control of the condominium unit as well as his illegal receipt of the prohibited benefits." *Id.* at 757. We determined that the warrant was drawn with sufficient particularity. The key in that case was that *any* evidence that the defendant had a presence in the condominium on a regular basis would have been proof of a violation of the Taft-Hartley Act, which prohibits union officials to receive benefits from an employer. As a result, the more precise language of the affidavit could not have served to limit the scope of the search authorized by the magistrate. *Id.* at 762-63.

The holdings in each of these decisions recognize that the breadth of items to be searched depends upon the particular factual context of each case and also the information available to the investigating agent that could limit the search at the time the warrant application is given to the magistrate. After reviewing the application in the present case, we conclude that the warrants did not violate the particularity principle, as the warrants were limited in three respects: (1) they specified that agents were searching for evidence of several specifically enumerated federal crimes; (2) the search was limited in time to evidence from 1990 to the date of the search in October 2001; and (3) the evidence sought was limited to records pertaining to: "United Corporation d/b/a Plaza Extra, Plessen Enterprises, Inc., Hamdan Diamond Corp., Sixteen Plus Corp. and any affiliated companies as well as their principals, officers managers, and employees (including but not limited to Fathi Yusuf, Maher Yusuf, Waleed "Wally" Hamed, and Waheed "Willy" Hamed")."

Given the nature of the crime and the limitation on the items to be searched, the warrant here was drafted

with sufficient particularity. It is important to remember that the government was conducting an investigation into money laundering and other complex white collar crimes. We have repeatedly stated that the government is to be given more flexibility regarding the items to be searched when the criminal activity deals with complex financial transactions. *See Christine*, 687 F.2d at 760 (stating that the flexibility inherent in the probable cause determination is "especially appropriate in cases involving corporate schemes spanning many years that can be uncovered only by exacting scrutiny of intricate financial records"); *see also Am. Investors*, 879 F.2d at 1106 ("Given the complex nature of a money-laundering enterprise, we cannot say that the categories over described the extent of the evidence sought to be seized.").

Indeed, it is difficult to conclude how the Government could have more narrowly tailored the warrant in this money laundering investigation. Like in *American Investors*, the government needed to search for a broad array of corporate documents to piece together United's unexplained large-scale currency deposits. The specific categories of corporate documents to be introduced at trial -- financial records, sales records, tax records, and purchase records -- are all probative of the cash flow coming into and going out of the Plaza Extra Supermarkets, and could establish the massive white collar scheme the Government has alleged in this case. *See Andresen v. Maryland*, 427 U.S. 463, 480 n.10, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976) (stating that the government was investigating a "complex real estate scheme whose existence could be proved only by piecing together many bits of evidence," and accordingly that,"[l]ike a jigsaw puzzle, the whole 'picture' of [the unlawful scheme] . . . would be shown only by placing in proper place the many pieces of

evidence that, taken singly, would show comparatively little"). Accordingly, we conclude that the warrants satisfied the particularity requirement with respect to the items to be searched.

Defendants' final argument is that the "catch-all" provision in paragraph 13 of Exhibit B, authorizing the government to search for evidence of "money laundering *and illegal activities*," renders the warrant unconstitutionally overbroad. In *Andresen*, the Supreme Court rejected a similar argument. The warrant in that case sought to search for items tending to establish the elements of the crime of false pretenses "together with other fruits, instrumentalities and evidence of crime at this (time) unknown." *Andresen*, 427 U.S. at 480 n.10. The Supreme Court concluded that the reference to an unknown crime in the warrant did not transform the warrant into a general warrant because the context of the warrant made clear the phrase "together with . . . crime at this time unknown" referred to the crime of false pretenses. *Id.* at 481-82.

The warrants in our case are even more specific than the warrant in *Andresen*. Our warrants state that the Government sought to search for evidence of money laundering *and* illegal business activities." In Exhibit B, paragraph a., "illegal business activities" is defined as "Money Laundering and Conspiracy to Commit Money Laundering, Failing to Report Exporting of Monetary Instruments, Mail Fraud, Wire Fraud, Alien Smuggling, Food Stamp Fraud, and Conspiracy." (App. 402.) Thus, unlike the term "crime" in *Andresen*, which the Court had to view in context to determine that it referred to the crime of false pretenses, the term "illegal business activities" is specifically defined in the warrant. Accordingly, we will interpret paragraph 13 with respect to that specific definition.

Under this interpretation, it is clear that paragraph 13 does not transform the warrants into general warrants.

IV.

The rule we adopt today recognizes the special quality of information obtained from a sister governmental agency pursuant to court order within the existing *Franks* framework. We stress that we do not adopt a *per se* rule that information obtained from a sister governmental agency will never be considered reckless. Such a conclusion would run counter to the teachings of *Franks* and its progeny and could possibly invite collusion among different agencies to insulate deliberate misstatements. The District Court erred in holding that Agent Petri's conduct was reckless in this case, however, because it did not take into consideration the nature and source of the information he received from VIBIR, as well as his reasonable subsequent investigation into the accuracy of the information. Although that information later turned out to be incorrect, we cannot conclude that Agent Petri's investigation would have given a reasonable official an obvious reason to doubt its accuracy.

Apart from our finding that Agent Petri did not act recklessly, we also conclude that the District Court erred in determining that a reformulated affidavit would have lacked probable cause. The circumstances surrounding the large-scale currency deposits in April 2001, which were structured in advance of the deposits and made solely in $ 50 and $ 100 bills, clearly provided probable cause to search for corporate business records at the Plaza Extra locations, particularly given the historical link of similar past activity at the Plaza Extra stores, as well as information provided by a foreign services agency regarding recent suspect offshore deposits made by the principal defendant. Furthermore,

we reject defendants' argument that the warrants were unconstitutional general warrants. The warrants were drafted with sufficient particularity because they explicitly incorporated an affidavit detailing the items that the government intended to search and seize. The government further limited the scope of the warrants by focusing on enumerated white collar federal offenses and by limiting the nature of documents sought to specific corporate records at the Plaza Extra stores over a ten-year time period.

For these reasons, we will reverse the decision of the District Court and remand for further proceedings consistent with this opinion.

APPENDIX B

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS
DIVISION OF ST. CROIX

UNITED STATES OF AMERICA and GOVERNMENT OF THE VIRGIN ISLANDS,	)
Plaintiffs,	)
v.	)
FATHI YUSUF MOHAMMED YUSUF, WALEED MOHAMMED HAMED, WAHEED MOHAMMED HAMED, MAHER FATHI YUSUF, ISAM MOHAMAD YOUSUF, and UNITED CORPORATION, dba Plaza Extra Supermarkets,	)
Defendants.	)

MEMORANDUM OPINION

Finch, J.

THIS MATTER comes before the court on Defendants' Motion to Suppress the evidence obtained in the course of executing search warrants issued on October 23, 2001 on the basis that the search warrants are invalid. Defendants assert *inter alia* that the Magis-

trate Judge issued the search warrants relying on an affidavit [hereinafter "the Warrant Affidavit"] of a Special Agent of the Federal Bureau of Investigatino [hereinafter "the FBI Special Agent" or "the Affiant"] which was made in reckless disregard for the truth.

I. Jurisprudence and Procedure under Franks v. Delaware

The Fourth Amendment shields against governmental intrusion in the guise of "unreasonable search and seizures" and mandates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." The Supreme Court in Franks v. Delaware, 438 U.S. 154, 168 (1978) recognized that "[t]he requirement that a warrant no issue' but upon probable cause, supported by Oath or affirmation,' would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile." When the magistrate judge in issuing a warrant is misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth, suppression is an appropriate remedy. United States v. Leon, 468 U.S. 897, 923 (1984). Defendants seek that remedy in this case.

Because an affidavit is presumed to be valid, a defendant must make a "substantial preliminary showing" before the Court will hear evidence challenging the affiant's veracity or commitment to unveiling and reporting the truth. Franks, 438 U.S. at 171. The defendant must show preliminarily that a false statement knowingly and intentionally, or with reckless disregard

for the truth, was included by the affiant in the warrant affidavit, and that the allegedly false statement is necessary to the finding of probable cause. Id. at 155-156. This requirement of a substantial preliminary showing is meant "to prevent the misuse of a veracity hearing for purposes of discovery or obstruction." Id. at 170.

In Franks v. Delaware, the Supreme Court delved into what would constitute a "substantial preliminary showing" that a false statement, made with reckless disregard for the truth, was included in an affidavit:

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernemental informant.

Franks, 438 U.S. at 171.

Once a court finds that a defendant has made a substantial preliminary showing that the warrant affi-

davit contains a false statement that was made intentionally or with reckless disregard for its truth, the court "must turn to the next step of the reconstructive surgery,...excise the offending inaccuracies and insert the facts recklessly omitted, and then determine whether or not the 'corrected' affidavit would establish probable cause." Wilson v. Russo, 212 F.3d 781, 789 (3d Cir. 2000). This "redaction process" is "a vehicle for determining whether there [is] a causal connection between the alleged misrepresentation...and the challenged search. If the information in the affidavit without the misrepresentation provided probable cause and the warrant should thus have been issued even had there been no scheme to deceive, there would be no causal connection between the scheme and the search and the search would not be tainted." United States v. Calisto, 838 F.2d 711, 715 (3d Cir. 1988). Therefore, the Court must "set to one side" material that is subject of the alleged falsity or reckless disregard and only consider the remainder of the affidavit to determine anew the issue of probable cause. See United States v. Harvey, 2 F.3d 1318, 1324 (3d Cir. 1993).

If a court determines that a defendant has made the necessary substantial preliminary showing, the Fourth Amendment requires that a hearing be held. Franks, 438 U.S. at 172. At this hearing, the defendant must prove "by a preponderance of the evidence 'that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit and [that] the allegedly false statement is necessary to the finding of probable cause." United States v. Frost, 999 F.2d 737, 742 (3d Cir. 1993) (quoting Franks, 438 U.S. at 155-56). If the defendant meets this burden of proof, "the Fourth Amendment requires that...the fruits of the search

[must be] excluded to the same extent as if probable cause was lacking on the face of the affidavit.'". Frost, 999 F.2d at 743 (quoting Franks, 438 U.S. at 156); see also United States v. Brown, 3 F.3d 673, 676 (3d Cir. 1993) (stating that "the fruits of the search must be excluded unless the remaining content of the warrant is sufficient to establish probable cause.").

Because, as a prerequisite to an evidentiary hearing, the defendant must have shown that the allegedly false statement is necessary to a finding of probable cause, the court must only address the first question at the hearing: Whether the defendant has proven by a preponderance of the evidence that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit. The second step, reviewing the warrant affidavit for probable cause with the offending portions redacted, need not be repeated.

II. Defendants' Substantial Preliminary Showing

A. Whether Defendants Have Preliminarily Shown that the FBI special Agent Made False Statements with Reckless Disregard for the Truth.

Whether Defendants have made a substantial preliminary showing that the FBI Special Agent made false statements with reckless disregard for the truth in the Warrant Affidavit requires a two-part inquiry. First, the Court must assess whether Defendants have made a substantial showing that the Warrant Affidavit contains false statements. Then the court must determine whether Defendants have made a substantial showing that such statements were made with reckless

disregard for the truth.

Defendants contend and the Government concedes that Paragraphs 23 and 24 contain false statements. Paragraph 23 of the FBI Special Agent's affidavit in support of the search warrants states in its entirety:

> According to my examination of the records of the Virgin Island Bureau of Internal Revenue (IRB), it appears that United Corporation d/b/a Plaza Extra under-reported its gross receipts to the IRB in 1998 through 2000, in connection with reports filed for the 4% Gross Receipts Tax imposed by the Government of the Virgin islands pursuant to Title 33 VIC Sections 43 and 44. That is, United Corp. reported approximately $270,000 in gross receipts during the year 1998. In contrast, in its 1998 corporate income tax return, United Corp. reported approximately $41 million in gross receipts. For 1999 and 2000, respectively, United Corp. reported approximately $3.7 million and $8.3 million in gross receipts in reports filed for the 4% Gross Receipts Tax. In contrast, in financial statements furnished to The Bank of Nova Scotia in order to obtain and later meet its obligations under a $2 million loan agreement signed by Fathi Yusuf in February 2000, United Corp. showed gross receipts of approximately $47 million and $54 million for 1999 and 2000, respectively. This would indicate that United Corp. either 91) under-reported its gross receipts to the IRB and therefore owes in excess of $3 million in gross receipts taxes for 1999-2000, which it did not re-

> veal to the Bank of Nova Scotia, or (2) substantially inflated its revenues for 1999-2000 in connection with its loan agreement, or both. According to the IRB, United Corporation did not file a corporate income tax return for 1999 or 2000, obtained extensions and still have not filed those returns.

The Government admits that United Corporation reported $39,120,091 in gross receipts tax return during the year 1998, not $270,000 as stated in the affidavit. Defendants have submitted the actual gross receipt tax returns for United Corporation for 1999 and for 2000 which show that United Corporation reported its gross receipts at $43,967,171 million for 1999 and $49,211,159 million for 2000, rather than the $3.7 million and $8.3 million attributed to 1999 and 2000 in the Warrant Affidavit. Defendants also have provided the date-stamped copy of Untied corporation's corporate income tax return for 1999 and 2000, indicating that they had been filed long before the FBI Special made out this affidavit. Finally, the Government indicates that the FBI Special Agent obtained computer printouts summarizing the gross receipts tax returns, which renders his reference to his "examination of the records of the Virgin island Bureau of Internal Revenue (IRB)" misleading, if not false.

Paragraph 24 which accuses United Corporation of violating "Title 33 VIC Sections 43, 44, and 53, " "18 U.S.C. 1341 (Mail Fraud) and 1343 (Wire Fraud)" and "18U.S.C. 1957 (money laundering)" is premised on the false statements of paragraph 23.[1]

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[1] Paragraph 24 provides in its entirety:

Therefore, it is false in its entirety.

The Courts finds that Defendants have made a substantial preliminary showing that the Warrant Affidavit contains false statements in paragraphs 23 and 24. Next, the Court addresses whether Defendants have made a substantial showing that the false statements were made in reckless disregard for the truth.

"An assertion is made with reckless disregard when viewing all the evidence, the affiant must have

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The preparation and submission of a false gross receipts tax return to the VIBIR is a violation of Title 33 VIC Sections 43, 44, and 53. Furthermore, by the submission of false financial statements to The Bank of Nova Scotia, wherein United Corp. either grossly overstated its revenues, or failed to report a latent Gross Receipts Tax liability of $3 million, United Corporation committed a fraud on a bank by creating the misimpression that it was more creditworthy than it was in reality. According to officers of the Bank of Nova Scotia, a loan of this magnitude requires independent review and express approval of the bank's headquarters in Toronto. The loan package was conveyed to Toronto by Federal Express. During the review process, there were communications between the bank office in St. Thomas and the headquarters in Toronto by e-mail and fax. The foreseeable use of interstate telephone facilities in fax and e-mail and the use of FEDEX communications in furtherance of the execution of a scheme to defraud constitutes violation of 18 U.S.C. 1341 (Mail Fraud) and 1343 (Wire Fraud). Any financial transactions in excess of $10,000 with the $2 million fraud proceeds are a violation of 18 U.S.C. 1957 (money laudering).

entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported." Wilson, 212 F.3d at 788 (quotation omitted). "In applying the reckless disregard test to assertions, [the Supreme Court has] borrowed from the free speech arena and equated reckless disregard for the truth with a 'high degree of awareness of [the statements'] probable falsity." Id. (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

The Government submits a second affidavit of the FBI Special Agent, who swore to the Warrant Affidavit, with which it attempts to convince the Court that the gross inaccuracies of paragraph 23, which led to the harsh accusation of paragraph 24, were not made recklessly. The FBI Special Agent states that when investigating agents noted the significant discrepancies in the records of the Virgin Islands Bureau of Internal Revenue (BIR), the agents returned to the BIR to obtain an explanation. The BIR was not able to provide a reason for the discrepancies.

The Affiant also avers that he personally returned to the BIR offices on multiple occasions in an attempt to determine a reason for the large differences. He states that on each visit, he was assured that the gross receipt tax information provided for United Corporation was complete. Rather than convince the Court that the FBI Special Agent included false statements in the affidavit believing them to be true, this second affidavit persuades the Court that he included incorrect figures with significant doubts as to their accuracy, and that he never revealed his concerns to the Magistrate Judge.

In further support of the Affiant's recklessness

with regard to the truth of the information relayed to the Magistrate Judge in support of the search warrants, Defendants point to paragraph 33, which states: "During September 2001, the FBI received information from CS#3 that s/he was told by Fathi Yusuf, during a conversation concerning Plaza Extra in 1980-81, 'Any man who can't take out $1 million a year in cash from a business like this is a fool.'". Defendants indicate that Plaza Extra did not open its doors until 1986. This fact is so readily and publicly available that it tends to show that the FBI Special Agent was so reckless in preparing the affidavit that he incorporated hearsay that he should have completely disregarded as unreliable.

In addition to the FBI Special Agent's own second affidavit indicating that he, himself, was concerned about the truth of what he had stated in his affidavit in support of the search warrants, his recklessness in including in paragraph 33 an absurd statement that someone relayed to him further supports the court's finding that Defendants have made a preliminary showing that a Franks hearing is warranted.

B. Whether After Striking Paragraphs 23 and 24, the Remainder of the Affidavit Provides Probable Cause.

In deciding whether to hold a Franks hearing, the Court must review the remainder of the Warrant Affidavit to determine whether it would have established probable cause for the Magistrate Judge to have issued the search warrants absent the offending paragraphs – paragraphs 23 and 24.

Rule 41(c) of the Federal Rules of Criminal

*Procedure states that a warrant may issue upon an affi*davit sworn to before a federal magistrate if the magistrate is satisfied that the affidavit is supported by probable cause. "Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Brinegar v. United States, 338 U.S.160, 175-176 (1949) (quoting Carroll v. United States, 267 U.S. 132, 161 (1925)).

Although proof beyond a reasonable doubt of criminal activity is not required, more than "a bare suspicion" is required. Id. at 175. Suspicion is not enough to establish probable cause for issuance of a search warrant. United States v. Harris, 403 U.S. 573, 597 (1971). "[P]robable cause which will justify the issuance of a search warrant is less than certainty or proof, but more than suspicion or possibility, the test being whether the allegations of the supporting affidavit warrant a prudent and cautious man in believing that the alleged offense has been committed." United States ex rel. Campbell v. Rundle, 327 F.2d 153, 163 (3d Cir. 1964) (quotation omitted).

"[A] warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause." Franks, 438 U.S. at 165. The affidavit, "read as a whole in a realistic and common sense manner," must "allege specific facts and circumstances" showing that "the items sought to be seized are associated with the crime and located in the place indicated." United States v. Newsom, 402 F.3d 780, 782 (7th Cir. 2005). "It is fundamental that the law of probable cause has been developed in an attempt to

prevent the issuance of a search warrant on the basis of vague and uncertain information." United States v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972).

The probable cause "to justify the issuance of a search warrant must exist at the time the warrant is issued." United States v. Harris, 482 F.2d 1115, 1119 (3d Cir. 1973). In other words, the observations supporting probable cause must not be stale. "It is not enough that the items may have been at the specified location at some time in the past – there must be probable cause to believe that they are there when the warrant issues." United States v. Tehfe, 722 F.2d 1114, 1119 (3d Cir. 1983).

"The question of the staleness of probable cause depends more on the nature of the unlawful activity alleged in the affidavit than the dates and times specified therein." Harris, 482 F.2d at 1119. Age alone is not the only criteria for judging the timeliness of a warrant application:

> Age of the information supporting a warrant application is a factor in determining probable cause. If too old, the information is stale, and probable cause may no longer exist. Age alone, however, does not determine staleness. The determination of probable cause is not merely an exercise in counting the days or even months between the facts relied on and the issuance of the warrant. Rather, we must also examine the nature of the crime and the type of evidence.

Harvey, 2 F.3d at 1322 (citations and quotations omitted). Timeliness must be determined based on the cir-

cumstances of each case. "The likelihood that the evidence sought is still in place depends on a number of variables, such as the nature of the crime, of the criminal, of the thing to be seized, and of the place to be searched." Tehfe, 722 F.2d at 1119.

For example, "when an activity is of a protracted and continuous nature the passage of time becomes less significant." Id. (quotation omitted). On the other hand, "[w]here the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time." Harris, 482 F.2d at 1119.

Although the affidavit supporting a search warrant may be based upon hearsay, Jones v. United States, 362 U.S. 257, 269 (1960), the affidavit should contain information explaining why the officers believe the supporting information to be reliable. See United States v. Leon, 468 U.S. 897, 904-05 (1984). A warrant should only be issued when, given all the circumstances set forth in the affidavit, "including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Harvey, 2 F.3d at 1321-22 (quoting Illinois v. Gates, 462 U.S. 213, 238-39 (1983)).

Defendants favor a paragraph by paragraph review of the Warrant Affidavit to determine whether any individual paragraph or group of paragraphs of the affidavit supplies probable cause. The Government insists that the Court is required to read the Warrant Affidavit as a whole.

The Court will examine the Warrant Affidavit

under the totality of the circumstances test to determine whether probable cause exists. See Gates, 462 U.S. at 238: "Probable cause exists to support the issuance of a search warrant if, based on a totality of the circumstances, 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" Sherwood v. Mulvihill, 113 F.3d 396, 401 (3d Cir. 1997) (quoting Gates, 462 U.S. at 238). Direct evidence need not link criminal activity to the place to be search; it is enough that an accumulation of circumstantial evidence indicates a fair probability of the presence of contraband at the location to be searched. United States v. Burton, 288 F.3d 91, 103 (3d Cir. 2002).

Thus, the Court considers whether the Warrant Affidavit as a whole, based on the totality of the circumstances, but excluding the false statements of paragraphs 23 and 24, presents sufficient evidence for the Magistrate Judge to have found probable cause that any of the crimes the Affiant alleges in the Warrant Affidavit were being or had been committed and that evidence of any of such crimes would be found at the locations and on the people indicated in the warrants. The crimes at issue, specified in paragraph 36 of the Warrant Affidavit, in the order in which they are discussed below, are (1) mail fraud and wire fraud; (2) food stamp fraud; (3) alien smuggling; (4) violation of the International and Emergency Economic Powers Act; (5) failure to report exporting of monetary Instruments; and (6) Money Laundering, Conspiracy to Commit Money Laundering and Conspiracy.

1. Mail Fraud and Wire Fraud

The only indication that United Corporation

was involved in mail fraud or wire fraud is in paragraph 24, which is based on the false statements in paragraph 23. There is no other basis, considering the Warrant Affidavit as a whole, to support a finding that any of the Defendants had committed or were committing mail fraud or wire fraud.

2. Food Stamp Fraud

Of the entire affidavit, only one paragraph addresses food stamp fraud – paragraph 31:

> In 2001, the FBI received information from a reliable confidential source who is in a position to know and whose information has proven to be accurate may times in the past (hereinafter CS #2) that Waheed Hamed at Plaza Extra has illegally purchased food stamps from stores that are owned by persons of Middle Eastern descent and that are not authorized to collect reimbursement for food stamps. Further, according to CS #2, after Plaza Extra has purchased the food stamps, it has collected improper reimbursement for those food stamps in violation of 7 U.S.C. 2024.

This paragraph fails to establish probable cause because it does not provide the time frame within which this food stamp fraud occurred and also lacks particularity. It does not indicate the dates of the purchases, the dates when reimbursement was applied for or collected, or the frequency or continuing nature of this crime. Thus, a reasonable person could not conclude that the information is timely.

The Affiant does not specify the stores from

which Waheed Hamed was purchasing food stamps or indicate the number of stores involved. The Warrant Affidavit provides no details concerning the amount or number of purchases or the amount of reimbursements. Finally, paragraph 31 does not state the basis of the confidential source's knowledge, nor does it indicate that any efforts were made to corroborate the information supplied.

Taking the Warrant Affidavit as a whole, the Court concludes that the Affiant has failed to establish probable cause that any of the Defendants were involved in food stamp fraud and that evidence of the food stamp fraud would be found in any of the locations or on any of the people to be searched.

3. Alien Smuggling

Paragraphs 14-15 of the Warrant Affidavit concern employment of illegal aliens by Plaza Extra. Paragraph 14 states that in 1995, the Immigration and Naturalization Service (INS) was informed that Plaza Extra in St. Thomas was employing a large number of illegal aliens. In 1997, according to paragraph 15, the INS charged Plaza Extra with failing to complete forms verifying its employees' citizenship. Plaza Extra paid a fine of $20,000 in settlement of that case.

Paragraph 16 and 17 deal more particularly with alien smuggling:

> 16. In 1999, INS commenced investigation into allegations that Plaza Extra was involved in smuggling Middle Eastern nationals into the US from the island of St. Maarten, Netherlands Antilles (NA). Further, Plaza Extra was known

to employ illegal Middle Eastern aliens at its supermarkets on weekends, at nights, and at odd hours of the day. Plaza Extra was reported to have paid these illegal employees in cash, kept handwritten logs or notes concerning these illegal employees separate from the regular employee records, and made no deductions or payments for payroll taxes, in order to shield both the illegal aliens and Plaza Extra from detection by law enforcement authorities, in violation of 8 U.S.C. 1324 and 1327 (Alien Smuggling Offenses).

17. On August 10, 1999, officers of INS executed federal search warrants at two Plaza Extra supermarkets, one in St. Thomas and the other at the United Shopping Plaza in St. Croix. They found three illegal Middle Eastern aliens working at the St. Thomas store. Prior to executing the search warrant, INS agents asked Fathi Yusuf if there were any illegal aliens employed at the St. Thomas store, and he said there were none. After the three illegal aliens were found working in the store, Yusuf admitted to INS that he was aware that they were illegally employed at Plaza Extra. Fathi Yusuf, one of the owners of Plaza Extra, and five other co-conspirators were charged with conspiracy and alien smuggling offenses relating to two other illegal aliens who had previously been arrested while trying to travel to the continental United States. One of the alien smuggling offenses was that Fathi Yusuf encouraged and induced illegal aliens to reside in the United States by employing them at Plaza Extra, in violation of 8 U.S.C. 1324. In 2001 Fathi Yu-

> suf pleaded guilty to three counts of 8 U.S.C. 1324a (Unlawful Employment of Unauthorized aliens); he was sentenced on September 19, 2001, to six months of house confinement.

The facts that the owner of United Corporation did not certify the citizenship of its employees and hired illegal aliens to encourage them to reside in the United States would provide probable cause that criminal activity was occurring, if the information were current or if there were any evidence that such conduct was ongoing. The Warrant Affidavit was signed more than two years after the most recent criminal activities mentioned in paragraphs 14 through 17, the only portions of the Warrant Affidavit pertaining to alien smuggling. Moreover, Defendant Fathi Yusuf was aware not only that United Corporation's employment of illegal aliens had been detected, and thus likely would be detected if it continued, but also that he would be personally punished for employing illegal aliens. The Affiant gave no indication that Fathi Yusuf's sentence on September 19, 2001 had not deterred him from continuing hiring illegal aliens, and that such criminal conduct was ongoing. The fact that Fathi Yusuf has a criminal record does not suffice, in and of itself, to show probable cause. See Beck v. Ohio, 379 U.S. 89, 96 (1964). To find that such fact constitutes probable cause "would be to hold that anyone with a previous criminal record could be arrested at will." Id. at 97.

In sum, the information in paragraphs 14-17 relating to the employment and smuggling of illegal aliens is not timely enough to show a fair probability that alien smuggling had been or was being committed and that evidence of such crime would be found in the

locations or on the people specified in the Warrant Affidavit.

4. Violation of the International Emergency Economic Powers Act

After reviewing the entire affidavit, the Court notes that only two paragraphs assert violations of the International Emergency Economic Powers Act. In paragraph 32, the FBI Special Agent avers:

> During September 2001, the FBI received information from a reliable confidential source, who is a good citizen in the Virgin Islands with no criminal record and has agreed to testify if necessary (hereinafter "CS #3") that s/he was told by Waleed Hamed, a manager employed at Plaza Extra, that he (Hamed) had arrange to smuggle more than $2 million US currency to the Middle East to Sadam Hussein during the time of the Persian Gulf War, which occurred in 1990. CS#3 said s/he was told by Hamed that he had done this because Hussein was "the great liberator" who would free the Middle East of the US and destroy Israel. Hamed said the cash had been secreted in the long robes of Muslim women. This smuggling of cash overseas was in violation of 31 U.S.C. 5316 and 5322 (Failure to Report Exporting of Monetary Instruments) and 50 U.S.C. 1701, et seq. (International Emergency Economic Powers Act).

According to the FBI Special Agent, as reported in paragraph 35 of the Warrant Affidavit, an anonymous caller indicated that an owner of Plaza Ex-

tra was similarly planning to send money to another war-torn area – Afghanistan:

> On October 12, 2001 an anonymous caller telephoned the FBI in San Juan, Puerto Rico and stated that the owner of Plaza Extra in St. Thomas had contacted Russell Robinson, a pilot at Clint Aero in St. Thomas, to transport two separate shipments of U.S. currency -- $900,000 and $1.2 million – by airplane from St. Thomas to St. Maarten, and that the money was destined for Afghanistan. [a violation of 50 U.S.C. 1701, et seq. (International Emergency Economic Powers Act)]. The caller indicated that both the owner of Plaza Extra and the pilot Russell Robinson had been convicted of alien smuggling in the past...

Paragraph 32 describes conduct that would violate the International Emergency Economic Powers Act, if true. The reason that paragraph 32 fails to establish probable cause necessary to support a search warrant is that it is both stale and does not address whether evidence of the crime would be likely to be found at the places or on the people to be searched.

Paragraph 35 might tend to indicate the crime of sending money to sensitive areas is ongoing, if it did not suffer with regard to its reliability. Although information from an anonymous caller can give probable cause for a search, it must have some "indicia of reliability." Gates, 462 U.S. at 233. Here, the caller does not indicate his or her basis of knowledge. The caller does not indicate when the contact occurred. The caller states that the owner of Plaza Extra has been convicted of alien smuggling which is untrue and casts

doubt on the caller's credibility. The caller failed to provide the FBI with sufficient information for the FBI to independently investigate the accuracy of the information. Indeed, there is no indication in the affidavit that any effort was made to corroborate the information received from the call. See id. at 241 (stating that the Supreme Court's decision applying the totality of the circumstances analysis "have consistently recognized the value of corroboration of details of an informant's tip by independent police work"). Therefore, the anonymous caller's allegations can be given little or no weight in the probable cause calculus.

Thus, reading the Warrant Affidavit as a whole, and considering the totality of the circumstances, paragraph 35 cannot resolve the staleness problem with paragraph 32 by showing continuing criminal conduct, because it is not sufficiently trustworthy. Moreover, there is no indication of the types of evidence that the FBI Special Agent expected would be found in the any of the areas that the search warrants covered that would be related to this crime.

5. Failure to Report Exporting of Monetary Instruments

Paragraphs 25, 32, 34, and 35 relate to transferring monetary instruments from within the United States to outside the United States. Paragraph 25 states that a group of merchants, "all using the last name Youssef or Yousuf, including Fathi Yusuf," made cash deposits in St. Maarten in excess of $2.2 million during 2000, which "appeared to far exceed the legitimate cash proceeds" of the retail sales of these merchant's businesses in St. Maarten. According to a "respected foreign service agency" the cash deposits "appeared to

involve money laundering of US currency."

Paragraph 25 lacks sufficient specificity to establish probable cause. It does not particularly identify the foreign service agency, the merchants, the merchants' businesses, or the amounts of cash deposited by the various merchants. Nor does it postulate the extent to which the amounts of cash deposited exceeds that which could have been derived from legitimate retail sales of the merchants' businesses. Finally, it does not provide any connection between the cash deposits and the locations and people for which the search warrants were sought.

As discussed above, paragraph 32 concerning the exporting of $2 million to the Middle East in 1990, is too untimely to indicate a fair probability that evidence of this crime would be found in any of the locations to be searched, and does not support a finding of probable cause that a crime has been or is being committed, absent other trustworthy information that similar conduct is ongoing.

Paragraphs 34 and 35 may have been included to show that the exporting of monetary instruments is continuing, but each suffers from its own infirmities. The lack of any indicia of reliability in paragraph 35 was addressed in analyzing whether the Warrant Affidavit makes a probable cause showing that the International emergency Economic Powers Act was violated. Paragraph 34 is more reliable as to its factual recitation, stating in its entirety:

> In 2001, FS#1 told the FBI that in 2001 Najeh Yusuf, son of Fathi Yusuf and part-owner of United Corp., and his wife traveled by

> plane from San Juan to Paris. Once in Paris, Najeh Yusuf departed immediately on a flight to Atlanta, Georgia, and Najeh's wife departed on a flight to Amman, Jordan. The unusual itinerary of Najeh Yusuf, going from San Juan to Atlanta via Paris, and his wife continuing on to Jordan, appears to be consistent with the behavior of a cash courier, in violation of 31 U.S.C. 5316 and 5322 (Failure to Report Exporting of Monetary Instruments).

The Achilles heel of paragraph 34, however, is that the connection between the travel arrangement described and exporting cash is no more than a product of the FBI Special Agent's suspicion and speculation. The FBI Special Agent's unsupported and conclusory belief, in and of itself, is insufficient to establish probable cause. Notably lacking is any indication of whether evidence of this crime would likely be found at any of the locations or on any of the persons subjected to being searched under the search warrants.

Considering 25, 32, 34, and 35 together, the only paragraphs of the Warrant Affidavit, that remotely relate to exporting monetary instruments, the Court finds that the Warrant Affidavit fails to establish probable cause that Defendant were failing to report the exporting of monetary instruments, or that evidence of such crime would be found in any of the locations or on any of the people named in the search warrants.

6. Money Laundering, Conspiracy to Commit Money Laundering and Conspiracy

A significant portion of the Warrant Affidavit is directed toward money laundering and conspiracy to commit money laundering. Paragraph 18 indicates that in August 1999, there was an estimated three to seven million dollars inside a safe on the second floor of the St. Thomas Plaza Extra store. The results of additional investigation, reported in paragraph 19, showed that United Corporation did not make such a large currency deposits in 1999.

These two facts together apparently led the Affiant to suspect that United corporation was not depositing cash into its bank accounts so that it could avoid paying taxes on such cash and could transfer it out of the United States. Absent the facts alleged in paragraph 23 that tended to show that United Corporation was not paying its gross receipt taxes, however, there is no basis fro drawing an inference from the large amount of cash in the safe that United Corporation was laundering money, rather than holding the money for some other legal purpose – such as paying vendors or cashing customer's and employee's checks. Indeed, the analysis of United Corporation's cash deposits for the period of January 2000 through August 2001, described in paragraph 20, showed excessive cash deposits during 19 weeks. If anything, this tends to show that the money viewed in the safe in 1999 was periodically deposited between January 2000 and August 2001, controverting the Affiant's money laundering insinuation.

Paragraph 21 discusses the deposit of more than $3 million for the week ending April 21, 2001, with $1.94 million deposited using seven deposit slips marked "Cash (Stockholder's Investment)." Paragraph 22 explains that United Corporation paid more than

$1.9 million in two checks to Hamdan Diamond Corp. with one of the checks marked "loan payment" and the other "partial payment." The checks were deposited in Hamdan Diamond Corp.'s Merrill Lynch account. Reading paragraphs 20, 21, and 22 together lead to the inference that the stockholder's of United Corporation had borrowed money from Hamdan Diamond corp., which they were repaying. Without paragraph 23, there is no indication that such transfer of funds involved any criminal activity.

If paragraph 25, regarding more than $2.2 million cash being deposited in St. Maarten, were more specific concerning the amount attributable to Fathi Yusuf, it would show a fair probability that a crime had been committed. However, the information is vague, as previously discussed. The Warrant Affidavit does not indicate what evidence would be likely to be found in the locations to be searched that would prove or disprove that Fathi Yusuf had deposited money in St. Maarten as part of a money laundering scheme. Again, absent paragraph 23, there is no evidence that United Corporation had any motivation to hide its currency.

Activities of Bashir Yashim, who is not alleged to be affiliated in any manner with United Corporation or the other Defendants, are reviewed in paragraphs 26-30. Yasim, according to a confidential informant, traffics in narcotics, and is involved in establishing beauty salons to launder the proceeds of his narcotics business. The only connection between Yasim and the Defendants is that described in paragraph 29: "Yasim has been in direct contact with the management of Plaza Extra in order to set up a similar operation in St. Croix."

The link between Yasim's activities and the Defendants is too nebulous for a reasonable person to draw any inferences of criminal conduct on the part of the Defendants. The Court is at a loss as to how Yasim's unilateral contact with the management of Plaza Extra implicates Defendants in any criminal activity and why evidence of such activity would likely to be found in any of the locations or on any of the people for which the search warrants were obtained.

Finally, the Affiant states:

> 33. During September 2001, the FBI received information from CS#3 that s/he was told by Fathi Yusuf, during a conversation concerning Plaza Extra in 1980-1981, "Any man who can't take out $1 million a year in cash from a business like this is a fool."

Even if Plaza Extra had existed in 1980 and 1981, and Fathi Yusuf's statement were not twenty years old, rendering it irremediably stale, the statement certainly was no an admission by Fathi Yusuf that United Corporation was hiding its income through money laundering to avoid paying its taxes.

The Court has reviewing the Warrant Affidavit as a whole, giving particular attention to the many paragraphs that were included to imply that Defendants were engaged in money laundering and a conspiracy to commit money laundering. With the excision of the paragraphs describing Defendants' evasion of taxes, the Warrant Affidavit fails to demonstrate a fair probability that Defendants were engaged in money laundering.

Not until paragraph 36 does the Affiant attempt to link any of the criminal conduct recited in the preceding paragraphs to the locations to be searched. In paragraph 36, the FBI Special Agent states:

> 36. Based on the above, I have probable cause to believe, and I do believe, that property constituting evidence of the federal crimes of 18 U.S.C. Sections 1956 and 1957 (Money Laundering and Conspiracy to Commit Money Laundering), 31 U.S.C. 5316 and 5322 (Failure to Report Exporting of Monetary Instruments), 18 U.S.C. 1341 (Mail Fraud), 18 U.S.C. 1343 (Wire Fraud), 8 U.S.C. 1324 (Alien Smuggling), 7 U.S.C. 2024 (Food Stamp Fraud); 50 U.S.C. 1701, et seq. (International Emergency Economic Powers Act), and 18 U.S.C. 371 (Conspiracy) is present within the territory of St. Thomas, USVI, and the locations set forth in Exhibit "A."

In United States v. Newman, 685 F.2d 90, 92 (3d Cir. 1982), the Third Circuit criticized a similarly conclusory statement, cautioning that "[t]he conclusory statement of the affiant that based on his experience he had reason to believe that ammunition and 'other fruits and instrumentalities of the...crime' would be found in the office cannot serve as a substitute for a demonstration of probable cause in the factual recitations of the affidavit." Paragraph 36 is inadequate to connect the activities described in the preceding paragraphs of the Warrant Affidavit to any of the locations or persons mentioned in Exhibit "A."

After reviewing each of the crimes for which

the Warrant Affidavit was intended to supply probable cause, the Court finds that the Warrant Affidavit is woefully deficient, absent the statements in paragraphs 23 and 24. The Warrant Affidavit does not show that there is a fair probability that Defendants committed any of the crimes in issue or that the evidence of such crimes would be found in the locations or on the people subject to the search warrants.

Thus, Defendants have made a substantial preliminary showing, as required under Franks, that (1) false statements were included by the FBI Special Agent in the Warrant Affidavit with reckless disregard for the truth and (2) the false statements are necessary to a finding of probable cause. Therefore, Defendants are entitled to a hearing to demonstrate by a preponderance of the evidence that the Warrant Affidavit contains false statements made with reckless disregard for the truth. See Franks, 438 U.S. at 155-156.

III. Whether Defendants Proved by a Preponderance that False Statements were Made in Reckless Disregard of the Truth

The Government concedes that the material statements of paragraph 23 and 24 concerning the amount of gross receipts taxes reported and paid by United Corporation, d/b/a Plaza Extra, are false, and that United Corporation did, in fact, file its 1999 and 2000 corporate tax returns. Thus, even without considering the affidavit Defendants submitted to meet their burden, the Court finds that the statements concerning the monthly gross receipt taxes and the filing of the annual corporate tax returns included in paragraphs 23 and 24 are false by a preponderance of the evidence.

To prove that such statements were made in reckless disregard of the truth, Defendants examined the FBI Special Agent who made such statements. "[A] defendant may attack the issuance of a warrant if based on untruthful information." Harvey, 2 F.3d 1318, 1323 (3d Cir. 1993). "This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily." Id. (quoting Franks, 438 U.S. at 165). However, an affidavit must "be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." Franks, 438 U.S. at 164-65. "To succeed in attacking a warrant, a defendant must come forward with 'allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.'". Harvey, 2 F.3d at 1323 (quoting Franks, 438 U.S. at 171).

The FBI Special Agent indicated that the Government had obtained an *ex parte* Order requiring the BIR to provide the FBI with tax documents concerning United Corporation. The BIR gave the FBI a copy of United Corporations's corporate tax return, but only computer printouts of the monthly gross receipts reported. The Affiant noted a huge difference between the gross receipts shown on the computer printouts and the gross receipts indicated on the corporate tax return. Months when United Corporation reported no gross receipts, followed by months in which gross receipts were reported in the range of millions of dollars, the FBI Special Agent found particularly troubling.

In attempts to reconcile these figures, the FBI Special Agent and other officers made repeated visits to the BIR to request that additional documents be provided in compliance with the *ex parte* order. The FBI Special Agent visited the BIR on five occasions between October 1 and October 19, 2001, because he felt that the BIR was withholding many documents. He even met with the BIR's director. Each time, the BIR failed to produce any additional documents and maintained that the computer printout was accurate.

Despite being unsatisfied with BIR's response concerning the obvious differences between the corporate tax return and the monthly gross receipt tax returns, as summarized in the computer printout, the FBI Special Agent did not seek a further court order or attempt to subpoena the actual gross receipt tax returns from the taxpayers or their accountants or cancelled checks from Defendants' banks. The FBI Special Agent testified that he did not know what steps had been taken to prepare the computer printout or whether the printout was reliable, having had no prior experience relating to such printouts. Although he never reviewed the monthly gross receipt tax returns and the BIR never provided him with any further documents, the FBI Special Agent testified that he satisfied himself that the computer printout was accurate.

Without verifying the suspect data from the BIR, the FBI Special Agent signed the Warrant Affidavit. In the Warrant Affidavit, the FBI Special Agent did not mention entertaining any uncertainty concerning the figures that he attested to in paragraph 23. Rather he sought to obtain documents via the requested search warrants to prove or disprove the information

provided by the BIR.

To bolster their evidence that the FBI Special Agent had taken a reckless approach to preparing the Warrant Affidavit, Defendants questioned the FBI Special Agent about paragraph 34, which discusses Naher Yusuf's and his wife's travel itineraries. The FBI Special Agent stated that he did not recall having ever attempted to independently corroborate the travel information.

As to paragraph 33, concerning Fathi Yusuf's statements about Plaza Extra, supposedly made in 1980-81, years before Plaza Extra's existence, the FBI Special Agent explained that the proper time frame was 1990 to 1991 and that the discrepancies was caused by a typographical error. Finally, the FBI Special Agent admitted that he had not made any effort to further investigate the information in paragraph 32 regarding food stamp fraud, and that he did not recall taking any steps to corroborate the contents of paragraph 31.

After observing the FBI Special Agent testify in response to Defendants' questions, and reviewing the limited documents that the FBI Special Agent had before him when he swore to the contents of the Warrant Affidavit, the Court concludes that Defendants have satisfied their burden. Defendants have shown by a preponderance of the evidence that the FBI Special Agent included material false statements in the Warrant Affidavit with reckless disregard for the truth.

IV. Conclusion

Defendants made the requisite substantial pre-

liminary showing for a Franks hearing. At the Franks hearing, Defendants showed by a preponderance of the evidence that material statements in the Warrant Affidavit were recklessly untruthful. Absent the paragraphs of the Warrant Affidavit that contain these material false statements, the Warrant Affidavit does not provide probable cause for the issuance of any of the search warrants. Accordingly, the Court will employ the exclusionary principle and suppress all evidence obtained as a result of executing the search warrants.

ENTER:

DATED: June 16, 2005

/s/
RAYMOND L. FINCH

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-3484

UNITED STATES OF AMERICA;
GOVERNMENT OF THE VIRGIN ISLANDS,

Appellants

v.

FATHI YUSUF MOHAMMED YUSUF a/k/a FATHI YUSUF;
WALEED MOHAMMED HAMED a/k/a WALLY HAMED;
WAHEED MOHAMMED HAMED a/k/a WILLIE YUSUF;
MAHER FATHI YUSUF a/k/a MIKE YUSUF;
ISAM MOHAMAD YOUSUF a/k/a SAM YOUSEF;
UNITED CORPORATION d/b/a PLAZA EXTRA;
NEJEH FATHI YUSUF

On Appeal from the District Court for the Virgin Islands
Division of St. Croix
(D.C. No. 05-cr-00015)
District Judge: Honorable Raymond L. Finch

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, CHAGARES, COWEN* and ROTH,** *Circuit Judges*

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* Judge Cowen's vote is limited to panel rehearing only.

** Judge Roth assumed senior status on May 31, 2006, and therefore her vote is limited to panel rehearing only.

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellees having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/

D. Michael Fisher

Circuit Judge

Dated: October 5, 2006

Supreme Court, U.S.
FILED
MAR 0 5 2007
OFFICE OF THE CLERK

(2)

No. 06-892

In the Supreme Court of the United States

FATHI YUSUF MOHAMMED YUSUF, AKA FATHI YUSUF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the warrants authorizing a search for evidence of a complex money laundering scheme, tax violations, and mail and wire fraud described petitioners' business records with sufficient particularity.

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In the Supreme Court of the United States

No. 06-892

FATHI YUSUF MOHAMMED YUSUF, AKA FATHI YUSUF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-46) is reported at 461 F.3d 374. The memorandum opinion of the district court for the District of the Virgin Islands (Pet. App. 47-78) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2006. A petition for rehearing was denied on October 5, 2006 (Pet. App. 79-80). The petition for a writ of certiorari was filed on December 28, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, a corporation based in the U.S. Virgin Islands and several of its owners and operators, were

charged in a 78-count indictment with money laundering, currency structuring, various tax violations, mail fraud, obstruction of justice, and conspiracy. Pet. App. 3. The district court granted a motion to suppress evidence based on a facial challenge to several search warrants. *Id.* at 47-78. On interlocutory appeal under 18 U.S.C. 3731 (2000 & Supp. IV 2004), the court of appeals reversed and remanded the case for further proceedings. Pet. App. 1-46.

1. In a series of seven transactions from April 16-19, 2001, United Corporation, a family-owned chain of supermarkets in the U.S. Virgin Islands, deposited $1,940,000 into its account with the Bank of Nova Scotia, entirely in denominations of $50 or $100. The bank found the activity suspicious and forwarded a report to the St. Thomas office of the FBI on July 20, 2001. Federal investigators immediately launched an investigation. Pet. App. 5.

On October 19, 2001, the FBI sought search warrants for three supermarkets, three residences, three individuals, and two safe deposit boxes in the Virgin Islands. Pet. App. 6-7 n.2. The warrant application included a sworn affidavit, signed by an FBI agent, describing the government's investigation in detail. Some information in the affidavit had been supplied by the Virgin Islands Bureau of Internal Revenue (VIBIR). *Id.* at 3.

The warrant application also contained two exhibits describing the items to be searched for and seized. Each warrant, in the space provided to describe the "property," contained the words: "See Exhibit 'B' marked 'Evidence' attached." See C.A. App. 380. Exhibit B, which was attached to each of the warrants and was not sealed, Pet. App. 39, contained the following description:

Any and all records, whether typed or handwritten, or stored on paper, magnetic or electronic medium (including information stored on computer systems) of money laundering and illegal business activities, including Money Laundering and Conspiracy to Commit Money Laundering, Failure to Report Exporting of Monetary Instruments, Mail Fraud, Wire Fraud, Alien Smuggling, Food Stamp Fraud, and Conspiracy to commit the same from 1990 to the present

pertaining to United Corporation d/b/a Plaza Extra, Plessen Enterprises, Inc., Hamdan Diamond Corp., Sixteen Plus Corp. and any affiliated companies, as well as their principals, officers, managers, and employees, including but not limited to Fathi Yusuf, Maher Yusuf, Waleed "Wally" Hamed, and Waheed "Willy" Hamed; including

1. Audit reports and financial statements of the above-listed companies and persons;

2. All financial records, including monthly statements, cancelled checks, deposit slips, certificates of deposit, of any and all banks and financial institutions where the above-listed companies and persons have accounts;

3. Any and all securities held or owned by the above-listed companies and persons and related records;

4. Any and all financial instruments, promissory notes, and letters of credit held or owned by the above-listed companies and persons and related records;

5. Documents, including corporate documents, identifying the names, addresses, dates of birth, telephone numbers, and social security numbers of all employees, officers, directors, and associates of the above-listed corporations and companies;

6. Any and all contracts, agreements, and correspondence;

7. Original contracts, promissory notes, subscription forms, purchases's [*sic*] receipts, compliance verification forms, W-9 forms, and correspondences executed or exchanged between United Corporation d/b/a Plaza Extra and all of its customers and associated companies;

8. Copies of all Internal Revenue Service and VI Bureau of Internal Revenue tax returns or other reporting forms and supporting schedules and documentation;

9. Telephone records, Rolodex records, telephone answering machine tapes;

10. Video tapes, disks or records;

11. Photos, whether recorded on paper, tape, or disk;

12. Documents and records pertaining to communication by facsimile (fax) transmissions;

13. Any other records of money laundering and illegal activities, including but not limited to:

> books, records, receipts, accounts, notes, logs, ledgers, journals, worksheets, invoices, pass books, money drafts, money orders, bank drafts, cashier checks, bank checks, safety deposit box keys, and money wrappers, airline tickets, and addresses and telephone numbers in books or on paper or stored in electronic form by computer systems, or word processing equipment.

App., *infra*, 1a-3a. Exhibit B also defined the terms "records," "information," and "[c]omputer systems," and called for the seizure of large quantities of cash or valuables "collected in a manner designed to facilitate convenient transport." *Id.* at 3a-4a.

On October 19, 2001, a magistrate judge of the United States District Court for the District of the Virgin Islands issued the warrants. C.A. App. 380. On October 23, 2001, federal agents executed the warrants at each of the locations described. Based on the evidence they discovered, a grand jury returned a 78-count indictment charging United Corporation and its owners and operators with various criminal offenses, including money laundering, currency structuring, tax violations, mail fraud, obstruction of justice, and conspiracy. Pet. App. 3, 12.

2. Some of the information contained in two paragraphs of the affidavit supporting the search warrant turned out to be inaccurate. The information, which had originated in documents provided to the FBI by VIBIR, overstated the amount of the discrepancy between the gross receipts reported on United Corporation's Virgin Islands tax filings and the gross receipts reported on its IRS tax filings for 1998, 1999, and 2000. Petitioners moved to suppress the evidence recovered during the

searches, arguing that the warrant was defective because of the false statements. Pet. App. 16-17.

Following a hearing pursuant to *Franks* v. *Delaware*, 438 U.S. 154 (1978), the district court found that certain statements in the affidavit were made with reckless disregard for the truth. The court therefore excised those statements and held that the reconstituted affidavit failed to establish probable cause. Accordingly, the district court suppressed all of the evidence seized during the execution of the search warrants. Pet. App. 3. That ruling "effectively dismiss[ed] the Government's case." *Ibid.*

3. The court of appeals reversed. Pet. App. 1-46. It determined that the FBI agent did not act recklessly in reporting the tax information provided by VIBIR because the agent did not have an "obvious reason to doubt the truth" of the documents provided. *Id.* at 4. To the contrary, the court of appeals concluded, the federal investigators acted with reasonable diligence in verifying the information, and their belief that United had underreported its gross receipts returns was "eminently plausible * * * at that point in the investigation." *Id.* at 23-24.

Moreover, the court of appeals held, even if the two challenged paragraphs of the affidavit were excised, the reconstituted affidavit "clearly establishes probable cause." Pet. App. 25. The affidavit described a series of bank deposits "made *solely* in $50 and $100 denominations," and the court of appeals found it "utterly incomprehensible that a retail supermarket chain receives and deposits cash only in such large denominations." *Id.* at 32. It found the district court's decision to invalidate the entire warrant for lack of probable cause "disconcerting." *Id.* at 25.

The court of appeals also considered, and rejected, petitioners' alternative argument that blanket suppression was required because the warrants were unconstitutional "general warrants" that violated the Fourth Amendment.[1] Pet. App. 36-38. Specifically, the court of appeals considered three claims: (1) that the warrants failed to describe the property to be searched and seized with particularity because they did not incorporate the affidavit, citing *Groh* v. *Ramirez*, 540 U.S. 551 (2004), Pet. App. 36, 38; (2) that the warrants referred to the crimes committed by name, rather than "by reference to the statutory elements in the United States Code," *id.* at 36; and (3) that the catch-all provision in paragraph 13 of Exhibit B, which allowed the agents to search for records of "money laundering and illegal activities," App., *infra*, 2a, gave agents unfettered discretion to conduct a general search. Pet. App. 36.

First, the court of appeals rejected petitioners' reliance on *Groh*. In that case, the warrant failed to incorporate the portion of the affidavit describing the items to be seized, and as a result the warrant "failed to identify *any* of the items that [the agent] intended to seize." Pet. App. 39 (quoting *Groh*, 540 U.S. at 554 (emphasis and alteration in the decision of the court of appeals)). Here, by contrast, the warrants expressly incorporated the attached Exhibit B, which described at length the items to be seized. *Ibid.* Thus, the court of appeals

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[1] Because it found no constitutional defect in the warrants, the court of appeals did not need to consider the government's alternative arguments that some of the evidence was admissible under the inevitable discovery doctrine, and that petitioners lacked a legitimate expectation of privacy in certain areas of the grocery stores that were searched. See Gov't C.A. Br. 50, 53; Govt. C.A. Reply Br. 22, 25.

held, "the problem which existed in *Groh* is simply not implicated in this case." *Ibid.*

Second, the court of appeals held that the warrants described the property to be searched and seized with sufficient particularity, notwithstanding their references to several federal crimes by name, rather than by reference to relevant provisions of the criminal code. Citing its decisions in *United States* v. *American Investors of Pittsburgh, Inc.*, 879 F.2d 1087 (3d Cir.), cert. denied, 493 U.S. 955 (1989) and 493 U.S. 1021 (1990), and *United States* v. *Kepner*, 843 F.2d 755 (3d Cir. 1988), the court noted that "the breadth of items to be searched depends upon the particular factual context of each case and also the information available to the investigating agent that could limit the search at the time the warrant application is given to the magistrate." Pet. App. 40-42. In this case, the court noted, Exhibit B contained several express limitations, restricting agents to evidence of enumerated federal crimes, narrowing the scope of the search to evidence from 1990 to the date of the search in 2001, and limiting the search to records "pertaining to" specific corporations and individuals. *Id.* at 42. Although the warrants authorized a broad search, the court of appeals emphasized that "the government was conducting an investigation into money laundering and other complex white collar crimes," and that investigators must have "more flexibility regarding the items to be searched when the criminal activity deals with complex financial transactions." *Id.* at 43. Indeed, the court found, "it is difficult to conclude how the Government could have more narrowly tailored the warrant in this money laundering investigation." *Ibid.*

Third, the court of appeals found no constitutional defect in the catch-all provision in paragraph 13 of Ex-

hibit B, which authorized the seizure of records of "money laundering *and illegal activities*." Pet. App. 44. Relying on this Court's decision in *Andresen* v. *Maryland*, 427 U.S. 463, 479-482 (1976), the court of appeals construed the phrase "illegal activities" to refer to the list of "illegal business activities" set forth in the opening paragraph of Exhibit B, and not to all illegal activities of any kind. Pet. App. 44. The court therefore found it "clear" that "paragraph 13 does not transform the warrants into general warrants." *Id.* at 45.

ARGUMENT

Petitioners contend (Pet. 9-11) that the search warrants in this case permitted unconstitutional general searches. They construe the warrants as permitting the seizure of all records of "illegal activities," and argue that the manner in which the warrants referred to specific criminal offenses rendered them impermissibly overbroad. The court of appeals correctly rejected both arguments based on a careful reading of Exhibit B and a determination that, under the circumstances, no more particularized description of the items to be seized was possible. Pet. App. 36-45. Its factbound conclusion does not conflict with the decisions of this Court or other courts of appeals. Further review is unwarranted.

1. Petitioners' principal argument (Pet. 13-14) is that paragraph 13 of Exhibit B authorized a general search for evidence of "illegal activities." This Court rejected a virtually identical claim in *Andresen* v. *Maryland*, 427 U.S. 463 (1976).

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. Amend. IV. In *Andresen*, 427 U.S. at 465, police had probable cause to believe that an attorney had defrauded the purchaser of a particular lot in a subdivision of Montgomery County, Maryland. Police obtained several warrants authorizing the search of the attorney's office and the seizure of specific documents relevant to that transaction "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." *Id.* at 480-481 n.10 (internal quotation marks omitted).[2] The attorney challenged the warrants based on the Fourth Amendment's particularity requirement,

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[2] The description of the items to be searched for and seized stated in full:

> [T]he following items pertaining to sale, purchase, settlement and conveyance of lot 13, block T, Potomac Woods subdivision, Montgomery County, Maryland:
>
> title notes, title abstracts, title rundowns; contracts of sale and/or assignments from Raffaele Antonelli and Rocco Caniglia to Mount Vernon Development Corporation and/or others; lien payoff correspondence and lien pay-off memoranda to and from lienholders and noteholders; correspondence and memoranda to and from trustees of deeds of trust; lenders instructions for a construction loan or construction and permanent loan; disbursement sheets and disbursement memoranda; checks, check stubs and ledger sheets indicating disbursement upon settlement; correspondence and memoranda concerning disbursements upon settlement; settlement state ments and settlement memoranda; fully or partially prepared deed of trust releases, whether or not executed and whether or not recorded; books, records, documents, papers, memoranda and correspondence, showing or tending to show a fraudulent intent, and/or knowledge as elements of the crime of false pretenses, in violation of Article 27, Section 140, of the Annotated Code of Maryland, 1957 Edition, as amended and revised, together with other fruits, instrumentalities and evidence of crime at this [time] unknown.

Andresen, 427 U.S. at 480-481 n.10 (internal quotation marks omitted).

calling the terms of the warrants "so broad as to make them impermissible 'general' warrants." *Id.* at 478.

This Court disagreed, noting that "the warrants for the most part were models of particularity" and rejecting the argument "that they were rendered fatally 'general' by the addition, in each warrant, to the exhaustive list of particularly described documents, of the phrase 'together with other fruits, instrumentalities and evidence of crime at this [time] unknown.'" *Andresen*, 427 U.S. at 479. That phrase, the Court emphasized, did not form part of "a separate sentence" but instead "appear[ed] in each warrant at the end of a sentence containing a lengthy list of specified and particular items to be seized." *Id.* at 480. Because each of the items in that list "follow[ed] the colon after the word 'Maryland,'" each "clause[] in the series [was] limited by what precedes that colon, namely, 'items pertaining to . . . lot 13, block T.'" *Id.* at 481. The Court therefore found it "clear from the context that the term 'crime' in the warrants refers only to the crime of false pretenses with respect to the sale of Lot 13T." *Id.* at 480-481.

The Court recognized the dangers "inherent in executing a warrant authorizing a search and seizure of a person's papers." *Andresen*, 427 U.S. at 482 n.11. In such a search, the Court observed, "it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized." *Ibid.* Nonetheless, the Court found no constitutional defect in the warrant language. Because the police were investigating a "complex real estate scheme whose existence could be proved only by piecing together many bits of evidence," the warrant had to sweep broadly to reach each piece of the "jigsaw puzzle." *Id.* at 481 n.10. The

Court admonished that "[t]he complexity of an illegal scheme may not be used as a shield to avoid detection." *Ibid.*

Based on *Andresen*, courts of appeals routinely interpret the "catch-all phrase" in a warrant "in light of the items that precede it." *United States* v. *Pindell*, 336 F.3d 1049, 1053 (D.C. Cir. 2003), cert. denied, 540 U.S. 1200 (2004). See *United States* v. *Riley*, 906 F.2d 841, 844 (2d Cir. 1990) ("In upholding broadly worded categories of items available for seizure, we have noted that the language of a warrant is to be construed in light of an illustrative list of seizable items.").[3] That interpretive approach follows from the "established interpretive canon[s]" *noscitur a sociis* and *ejusdem generis*, *Pindell*, 336 F.3d at 1053, which counsel that "[w]here

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[3] See, *e.g.*, *Pindell*, 336 F.3d at 1053 (rejecting a particularity challenge to warrants that authorized the seizure of "any other evidence of a violation of Title 18 U.S.C. § 242" because that language appeared "in the same sentence as, and at the conclusion of, a quite specific list of items to be seized," making it "reasonably clear that the warrants did not authorize the seizure of evidence of just any violation of § 242"); *United States* v. *Ables*, 167 F.3d 1021, 1033-1034 (6th Cir.) (construing search warrants as describing the items to be seized with particularity, notwithstanding a phrase authorizing the seizure of "other items evidencing" certain financial transactions, because the warrants contained an "illustrative list of items" that "supplied sufficient examples of the items that the IRS was authorized to seize—bank statements, money drafts, letters of credit, money orders, cashier's checks, pass books, bank checks, automatic teller machine receipts, Western Union receipts, etc." to prevent "general exploratory rummaging" by the police), cert. denied, 527 U.S. 1027 (1999); *United States* v. *Young*, 745 F.2d 733, 758-759 (2d Cir. 1984) (finding no constitutional defect in a warrant containing "boilerplate language" that authorized the seizure of "other evidence" of a drug conspiracy because that language "followed a list of more specific items to be seized, and could be construed only in conjunction with that list"), cert. denied, 470 U.S. 1084 (1985).

general words follow specific words * * * the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words," *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (quoting *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001)). It also accords with the general rule that courts should interpret warrants and supporting affidavits in a "commonsense," rather than "hypertechnical," manner. *Illinois* v. *Gates*, 462 U.S. 213, 236 (1983) (citation omitted); *United States* v. *Sells*, 463 F.3d 1148, 1156 (10th Cir. 2006), cert. denied, No. 06-8487 (Feb. 20, 2007); *United States* v. *Gendron*, 18 F.3d 955, 966 (1st Cir.) (Breyer, C.J.), cert. denied, 513 U.S. 1051 (1994). See *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965) ("Technical requirements * * * have no proper place in this area.").

Courts of appeals also "universally recognize[]" that the Fourth Amendment's particularity requirement "must be applied with a practical margin of flexibility, depending on the type of property to be seized, and that a description of property will be acceptable if it is as specific as the circumstances and nature of activity under investigation permit." *United States* v. *Wuagneux*, 683 F.2d 1343, 1349 (11th Cir. 1982) (collecting cases), cert. denied, 464 U.S. 814 (1983). Accordingly, when interpreting search warrants in cases "involving complex financial transactions and widespread allegations of various types of fraud," courts recognize that an extensive search of business records may be necessary. *Ibid.*[4] Several courts of appeals have upheld warrants

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[4] See, *e.g.*, *United States* v. *$92,422.57*, 307 F.3d 137, 149-150 (3d Cir. 2002) (Alito, J.) (finding that a warrant authorizing the seizure of "[r]e-

calling for the seizure of all business records of an enterprise based on probable cause to believe that the enterprise was engaged in a "pervasive scheme to defraud." *United States* v. *Martinelli*, 454 F.3d 1300, 1307 (11th Cir. 2006) (citation omitted), petition for cert. pending, No. 06-1098 (filed Feb. 5, 2007); *United States* v. *Smith*, 424 F.3d 992, 1004-1006 (9th Cir. 2005), cert. denied, 126 S. Ct. 1477 and 1770 (2006); *Marvin* v. *United States*, 732 F.2d 669, 674 (8th Cir. 1984); *United States* v. *Brien*, 617 F.2d 299, 309 (1st Cir.), cert. denied, 446 U.S. 919 (1980).

In this case, paragraph 13 of Exhibit B authorized a search for "[a]ny other records of money laundering and illegal activities." App., *infra*, 2a. Contrary to petitioners' claim that paragraph 13 granted the FBI unlimited discretion to search for evidence of illegal activities, that clause must be construed in light of the preceding list of records and other limitations on the scope of the search. Pet. App. 44-45. Like the clause challenged in *Andresen*, paragraph 13 is a "catch-all" that appears at the

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ceipts, invoices, lists of business associates, delivery schedules, ledgers, financial statements, cash receipts, disbursement, and sales journals,and correspondence" was "indubitably broad, but * * * not 'general'" in light of the purpose of the investigation and the suspected underlying criminal activity); *United States* v. *Logan*, 250 F.3d 350, 365 (6th Cir.) (noting that "[a] description contained in a warrant is sufficiently particular if it is as specific as the circumstances and the nature of the alleged crime permit," and upholding warrant language based on the complexity and nature of the suspected fraud), cert. denied, 534 U.S. 895 and 997 (2001); *United States* v. *Travers*, 233 F.3d 1327, 1330 (11th Cir. 2000) (recognizing, in a case where the charges included "mail fraud, bankruptcy fraud, equity skimming, and money laundering," that "cases involving 'complex financial fraud . . . justify a more flexible reading of the fourth amendment particularity requirement'") (citation omitted), cert. denied, 534 U.S. 830 (2001).

end of a long sentence listing specific records subject to search and seizure. 427 U.S. at 479. Indeed, because it extends only to "*other* records of money laundering and illegal activities," App., *infra*, 2a (emphasis added), paragraph 13 cannot be understood except by reference to the kind of records of money laundering and illegal activities described earlier in Exhibit B. Similarly, the phrase "money laundering and illegal activities" in paragraph 13 plainly echoes the introductory description of the crimes for which the FBI had probable cause: "money laundering and illegal *business* activities, including Money Laundering and Conspiracy to Commit Money Laundering, Failure to Report Exporting of Monetary Instruments, Mail Fraud, Wire Fraud, Alien Smuggling, Food Stamp Fraud, and Conspiracy to commit the same." *Id.* at 1a (emphasis added). Read "with[] reference to the rest of the long sentence at the end of which it appears," *Andresen*, 427 U.S. at 479, paragraph 13 operates merely to include additional types of business records not described in paragraphs 1-12 but related to the same alleged criminal activities.

Under the circumstances, the warrants could not have contained a more particularized description of the items to be seized. The court of appeals held, and petitioners no longer challenge, that the FBI had probable cause to believe that United Corporation and its principals had engaged in money laundering, mail and wire fraud, and reporting violations. Pet. App. 32-36. The affidavit accompanying the warrants also described the FBI's suspicions of alien smuggling and food stamp fraud. *Id.* at 61-64. Because the investigation involved a "massive white collar scheme" and allegations of pervasive fraud, *id.* at 43, the search warrants reasonably called for an extensive search of business records per-

taining to United Corporation and its affiliates and principals. Based on an assessment of the affidavit and search warrants, the court of appeals found it "difficult to conclude how the Government could have more narrowly tailored the warrant in this money laundering investigation." *Ibid.* That factbound determination, like the court's resolution of the dispute over the proper construction of Exhibit B, does not warrant further review by this Court.[5]

2. Petitioners also argue (Pet. 16-18) that the references to criminal offenses in Exhibit B violated the Fourth Amendment's particularity requirement in two ways. First, they note (Pet. 16) that money laundering, mail fraud, and wire fraud are "generic offenses derivative of other * * * criminal conduct." Second, they object (Pet. 17) that Exhibit B refers to criminal of-

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[5] Petitioners' reliance (Pet. 11-13) on *Groh* v. *Ramirez*, 540 U.S. 551 (2004), is misplaced. *Groh* held that a warrant application that "adequately describe[s] the 'things to be seized'" cannot "save the *warrant* from its facial invalidity," but expressly held open the possibility that "a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *Id.* at 557-558. In this case, the government makes no claim that the affidavit itself operates to constrain the scope of the search. Instead, the government relies on the language of Exhibit B, which was expressly incorporated into and attached to each warrant. See C.A. App. 380 ("Exhibit 'B' marked 'Evidence' attached."); *United States* v. *Moser*, 123 F.3d 813, 823 n.7 (6th Cir. 1997) (finding attachment of the affidavit irrelevant because "exhibit B (not the affidavit) was the document that limited the agents' discretion by describing with sufficient particularity the types of items to be seized, and exhibit B was attached to (and expressly referenced by) the search warrant"), cert. denied, 522 U.S. 1020 and 1035 (1997) and 522 U.S. 1092 (1998). Thus, as the court of appeals recognized, "the problem which existed in *Groh* is simply not implicated in this case." Pet. App. 39.

fenses by name, rather than describing their elements or citing particular section numbers within the United States Code. Because no court of appeals has accepted those arguments, further review by this Court is unwarranted.

As the court of appeals emphasized, the warrants in this case constrained the scope of the search in three ways: (1) "they specified that agents were searching for evidence of several specifically enumerated federal crimes"; (2) they restricted investigators "to evidence from 1990 to the date of the search in October 2001"; and (3) they restricted the search to records "pertaining to" United Corporation and its affiliated companies, principals, and employees. Pet. App. 42. Because those restrictions appear before the semicolon that introduces the numbered paragraphs, the records described in each "clause[] in the series" must satisfy those offense, time, and subject-matter requirements. See *Andresen*, 427 U.S. at 481. Under the circumstances, the warrants describe the items to be seized with reasonable particularity. Pet. App. 42-43.

Petitioners note that three of the criminal offenses named in Exhibit B, mail fraud (see 18 U.S.C. 1341), wire fraud (see 18 U.S.C. 1343), and money laundering (see 18 U.S.C. 1956 and 1957), depend on other underlying criminal conduct: "specified unlawful activity" in the case of money laundering, 18 U.S.C. 1956(a)(1), or a "scheme or artifice to defraud" in the case of mail or wire fraud, 18 U.S.C. 1341, 1343. They argue that naming those offenses, which are derivative of other offenses, violates the Fourth Amendment's particularity requirement by sweeping in a wide range of other criminal conduct.

No court of appeals has embraced such a rule, and several have rejected it, at least implicitly.[6] The inclusion of money laundering, mail fraud, and wire fraud in the list can be reasonably construed to refer only to the unique elements of those offenses, as distinct from the underlying specified unlawful activity or scheme to defraud. See *Gates*, 462 U.S. at 236 (1983) (adopting a "commonsense" rather than "hypertechnical" construction of the affidavit accompanying a warrant) (quoting *Ventresca*, 380 U.S. at 109). Under the circumstances of this case, no more particularized description of the suspected criminal offenses was possible. The structured deposits, detected by petitioners' bank and reported to

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[6] See *United States* v. *Ervasti*, 201 F.3d 1029, 1039 & n.7 (8th Cir. 2000) (finding no constitutional defect in a warrant that authorized the seizure of a host of business records "all of which are evidence of violations of Title 18, [U.S.C.], Sections 1341 and 1343 [mail and wire fraud], and Title 26, [U.S.C.], Section 7212(a) [interference with administration of tax laws], for the period of 1991 to present"); *Moser*, 123 F.3d at 823 (finding no violation of the particularity requirement where the warrant authorized the seizure of "property designated and intended for use and which is and has been used as a means of committing an offense concerning a violation of Title 18, United States Code, Section 1341," which criminalizes mail fraud); *United States* v. *Sawyer*, 799 F.2d 1494, 1508-1509 & n.15 (11th Cir. 1986) (finding no violation of the particularity requirement where the warrant authorized the search and seizure of a wide range of documents and records "which are evidence and fruits of, and the means of commission of violations of Title 18, U.S. Code, Sections 1341, 1343, 371 and violations of the Commodity Exchange Act, Title 7, U.S. Code, Section 6(b) 60(1)"), cert. denied, 479 U.S. 1069 (1987); *United States* v. *Lamport*, 787 F.2d 474, 476 (10th Cir.) (upholding a warrant that called for a search of various specific items along with "any other property that constitutes evidence of the commission of the criminal offense, Title 18, United States Code, Section 1341 (Mail Fraud)," based on the circumstances of the investigation), cert. denied, 479 U.S. 846 (1986).

the FBI, strongly suggested an effort to transfer almost $2 million in a manner that would avoid detection. Based on those deposits and other evidence obtained by the FBI before applying for the warrants, investigators had probable cause to believe that petitioners had engaged in money laundering or mail or wire fraud, but could not be certain as to the original source of the funds. Pet. App. 32-35.

Petitioners also fault the affidavit for referring to each criminal offense "by its generic name" rather than describing its elements or specifying a "location within the United States Code." Pet. 17; see Pet. 6. Again, no court has embraced that argument, and at least one court of appeals has rejected it. See *United States* v. *Rude*, 88 F.3d 1538, 1551 (9th Cir. 1996) (finding no constitutional defect in a warrant that authorized the seizure of a host of business records and other items "traceable to fraud and money laundering," and specifically rejecting the argument that the warrant "failed to state with particularity any guidelines for the agents to determine objectively whether a document to be seized related to wire fraud or money laundering"), cert. denied, 519 U.S. 1058 (1997).

The cases on which petitioners rely (Pet. 17-18) are readily distinguishable. Three decisions, *Rickert* v. *Sweeney*, 813 F.2d 907, 909 (8th Cir. 1987), *Voss* v. *Bergsgaard*, 774 F.2d 402, 405 (10th Cir. 1985), and *United States* v. *Cardwell*, 680 F.2d 75, 77 (9th Cir. 1982), hold only that a bare reference to the general conspiracy or tax evasion statutes places no effective limit on the scope of a warrant. In *Rickert*, the court held that "probable cause existed only to search for evidence of tax evasion in connection with one particular project," and invalidated a warrant that authorized the seizure of

records related to all projects. 813 F.2d at 909. Similarly, in *Voss*, the court held that probable cause existed only as to the existence of "a substantial tax fraud scheme," and could not justify the seizure of all of an organization's records, including those related to lawful political advocacy protected by the First Amendment. 774 F.2d at 406. In *Cardwell*, the defect was particularly clear because IRS agents were "already focused * * * on certain portions of the appellants' business record": "the government knew exactly what it needed and wanted and where the records were located," but nonetheless obtained a warrant authorizing a "massive re-examination" of the defendant's records. 680 F.2d at 78 (quoting *VonderAhe* v. *Howland*, 508 F.2d 364, 370 (9th Cir. 1975)).[7]

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[7] The other decisions cited by petitioners are factually inapposite for the same reason. In *United States* v. *Abrams*, 615 F.2d 541, 542-543 (1st Cir. 1980), investigators suspected that three doctors had submitted false Medicare and Medicaid claims, but because of the broad description in the search warrant, officers seized all patient records, including the "records of non-Medicare-Medicaid patients." In *In re Lafayette Academy, Inc.*, 610 F.2d 1, 3 (1st Cir. 1979), investigators had probable cause to believe that a school had engaged in fraud in connection with the Federal Insured Student Loan Program (FISLP), but obtained a warrant that authorized the seizure of four truckloads of the school's business and student records, including records having no possible connection to FISLP. Both cases involve warrants that swept more broadly than the showing of probable cause.

Petitioners' reliance on *United States* v. *Spilotro*, 800 F.2d 959 (9th Cir. 1986) (Kennedy, J.), is also misguided. The warrants in that case called for the seizure of "notebooks, notes, documents, address books, and other records; safe deposit box keys, cash, and other assets; photographs, equipment including electronic scanning devices, and other items and paraphernalia, which are evidence of violations of 18 U.S.C. 1084, 1952, 892-894, 371, 1503, 1511, 2314, 2315, 1962-1963." *Id.* at 962. The court held that the warrants lacked particularity because "the

In this case, by contrast, the court of appeals found it "difficult to conclude how the Government could have more narrowly tailored the warrant" in light of the size, complexity, and pervasiveness of petitioners' suspected money laundering, tax violations, and fraud. Pet. App. 43. Petitioners make no effort to compare the evidence described in the warrant application with the scope of the search authorized in Exhibit B, and instead seize upon individual phrases which, in isolation, could suggest an impermissibly broad authority to search. The court of appeals, on the other hand, painstakingly compared the supporting affidavit with the scope of the warrant, noting that "the government needed to search for a broad array of corporate documents to piece together United's unexplained large-scale currency deposits" and concluding that the "financial records, sales records, tax records, and purchase records" described in Exhibit B "are all probative of the cash flow" and "could establish the massive white collar scheme the Government has alleged in this case." *Ibid.* Based on the nature of the investigation and the warrant's express limitations, the court of appeals held that "the warrant here was drafted

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government could have narrowed most of the descriptions in the warrants either by describing in greater detail the items one commonly expects to find on premises used for the criminal activities in question, or, at the very least, by describing the criminal activities themselves rather than simply referring to the statute believed to have been violated." *Id.* at 964. Here, the government followed both of those instructions. Exhibit B includes 12 paragraphs describing, at length, the types of records that typically contain information relevant to the criminal activities listed, along with a "catch-all" provision in paragraph 12. See App., *infra*, 1a-2a. It also listed specific criminal offenses by name, rather than merely citing section numbers of the United States Code. *Id.* at 1a.

with sufficient particularity." *Id.* at 42-43. Further review of that fact-intensive inquiry is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2007

APPENDIX

Exhibit "B"
Evidence

a. Any and all records, whether typed or handwritten, or stored on paper, magnetic or electronic medium (including information stored on computer systems) or money laundering and illegal business activities, including Money Laundering and Conspiracy to Commit Money Laundering, Failure to Report Exporting of Monetary Instruments, Mail Fraud, Wire Fraud, Alien Smuggling, Food Stamp Fraud, and Conspiracy to commit the same from 1990 to the present

pertaining to United Corporation d/b/a Plaza Extra, Plessen Enterprises, Inc., Hamdan Diamond Corp., Sixteen Plus Corp. and any affiliated companies, as well as their principals, officers, managers, and employees, including but not limited to Fathi Yusuf, Maher Yusuf, Waleed "Wally" Hamed, and Waheed "Willy" Hamed; including

1. Audit reports and financial statements of the above-listed companies and persons;

2. All financial records, including monthly statements, cancelled checks, deposit slips, certificates of deposit, of any and all banks and financial institutions where the above-listed companies and persons have accounts;

3. Any and all securities held or owned by the above-listed companies and persons and related records;

4. Any and all financial instruments, promissory notes, and letters of credit held or owned by the above-listed companies and persons and related records;

5. Documents, including corporate documents, identifying the names, addresses, dates of birth, telephone numbers, and social security numbers of all employees, officers, directors, and associates of the above-listed corporations and companies;

6. Any and all contracts, agreements, and correspondence;

7. Original contracts, promissory notes, subscription forms, purchases's receipts, compliance verification forms, W-9 forms, and correspondences executed or exchanged between United Corporation d/b/a Plaza Extra and all of its customers and associated companies;

8. Copies of all Internal Revenue Service and VI Bureau of Internal Revenue tax returns or other reporting forms and supporting schedules and documentation;

9. Telephone records, Rolodex records, telephone answering machine tapes;

10. Video tapes, disks or records;

11. Photos, whether recorded on paper, tape, or disk;

12. Documents and records pertaining to communication by facsimile (fax) transmissions;

13. Any other records of money laundering and illegal activities, including but not limited to:

books, records, receipts, accounts, notes, logs, ledgers, journals, worksheets, invoices, pass books, money drafts, money orders, bank drafts, cashier checks, bank

checks, safety deposit box keys, and money wrappers, airline tickets, and addresses and telephone numbers in books or on paper or stored in electronic form by computer systems, or word processing equipment.

The terms "records" and "information" include:

all of the foregoing items of evidence in whatever form and by whatever means they may have been created or stored, including any electrical, electronic, or magnetic form (such as any information on an electronic or magnetic storage device, including floppy diskettes, hard disks, ZIP disks, CD-ROMs, optical discs, backup tapes, printer buffers, smart cards, memory calculators, pagers, personal digital assistants such as Palm Pilot computers, as well as printouts or readouts from any magnetic storage device); any handmade form (such as writing, drawing, painting); any mechanical form (such as printing or typing); and any photographic form (such as microfilm, microfiche, prints, slides, negatives, videotapes, motion pictures, photocopies).

Computer systems include:

computer hardware, meaning hard disks, floppy disks, magnetic tape, central processing units, monitors, keyboards, connecting wires, printers, modems, plotters, encryptions, circuits boards, optical scanners, external hard drives, computer storage facilities, all electronic devices which are capable of analyzing, creating, displaying converting, or transmitting electronic or magnetic computer impulses or data, and other computer related devices; and

computer software, meaning any and all instructions or programs stored in the form of electronic or magnetic media which are capable of being interpreted by a

computer or related component, including operating systems, application software, utility programs, compilers, interpreters, and other programs or software used to communicate with computer hardware or peripherals, either directly or indirectly, via telephone lines, radio, or other means of transmissions, and computer instruction manuals for the use of any computers and their accessories found at the premises; and

recorded information pertaining to any e-mail stored on computers, e-mail servers, mail gateways, logs and other reads pertaining to e-mail, including all stored files, e-mail messages, attached documents, and web pages; all files and transactional logs associated with e-mail, including all telephone numbers used to access e-mail, dates, times, method of connecting, port, dial-up, location, attached file names and sizes, and user names, and all billing records, account history, and subscriber information related to e-mail; and

b. any large accumulations or bundles of US currency, precious metals, precious stones and jewelry stored or collected in a manner designed to facilitate convenient transport, exclusive of cash or valuables that are kept in a manner clearly consistent with the normal operation of legitimate business or normal personal affairs.

(3)

FILED
MAR 13 2007
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SUPREME COURT, U.S.

No. 06-892

In The Supreme Court of the United States

FATHI YUSUF MOHAMMED YUSUF, a/k/a FATHI YUSUF; WALEED MOHAMMED HAMED, a/k/a WALLY HAMED; WAHEED MOHAMMED HAMED, a/k/a WILLIE YUSUF; MAHER FATHI YUSUF, a/k/a MIKE YUSUF; ISAM MOHAMAD YOUSUF, a/k/a SAM YOUSEF; UNITED CORPORATION, dba Plaza Extra Supermarkets, and NEJEH FATHI YUSUF,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR PETITIONER

The government seeks to justify the overbroad search warrant in this case -- calling for a search for "any other records of money laundering and illegal activities" -- by arguing that this expansive language was somehow limited by the language "that precede[d] it." (Government's Opposing Brief, "GOB" at 12). But none of the cases cited by the government (GOB at pp. 12-14) support the government's claim. Indeed, most of the cases cited uphold Petitioner's position here and require this Court to review the Third Circuit decision below.

In *United States v. Pindell*, 336 F.3d 1049, 1053 (D.C. Cir 2003), the government was investigating a local police officer who used his authority to rob customers of local prostitutes. To obtain evidence of the crime, the government sought a search warrant of the defendant's home. The warrant called for the seizure of the following items: "green card, and driver's license [in] the name of Osman Dainkeh [one of the officer's victims] cash money in the amount of approximately $500, a white gold chain, a dark blue police uniform" and "*any other evidence of a violation of Title 18 U.S.C. 242*" (emphasis in original). The defendant argued that the broad catch-all language at the end of the description was too broad. The Court of Appeals rejected that argument.

> We have no doubt that had the warrants *merely* authorized the seizure of "evidence of a violation of Title 18 U.S.C. § 242, *they would indeed have been impermissibly broad*. But that phrase did not stand alone, and instead came in the same sentence as, and at the conclusion of,

> a quite specific list of items to be seized. That list constrained the interpretation of the last phrase, making it reasonably clear that the warrants did not authorize the seizure of just any violation of § 242, but rather of evidence relating to such a violation in connection with Osman Dainkeh. 336 F.3d at 1053 (emphasis added)

In this case, we have precisely the situation condemned by the *Pindell* court – a broadly worded warrant that allows seizure of evidence of *any* crime, let alone any evidence of a specific federal crime. The warrant calls for the seizure of "any and all records of money laundering and illegal business activities, including" a list of specific federal crimes, such as money laundering, conspiracy, mail fraud and wire fraud.[1] The categories of evidence to be seized included "any other records of money laundering and illegal activities." (See GOB Appendix, document entitled "Exhibit B"). The phrase "any business activities" was not limited by any words that preceded it since the phrase "money laundering and illegal business activities" signifies that each term stands on its own as a separate category.

In *United States v. Riley*, 906 F.2d 841 (2d Cir. 1990), the warrant called for the seizure of "evidence of the offense of conspiracy to distribute controlled substances." The list contained a specific list of material and then added a list of additional financial

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[1] Contrary to the government's statement in its "Question Presented," there were no tax violations alleged in either the search warrant affidavit or listed in the search warrant itself, see Exhibit B to GOB.

records covering the investment of the proceeds of illegal drug transactions, as well as "and other items that constitute evidence of the offenses of conspiracy to distribute controlled substances and distribution of the same." The Court of Appeals (with one judge dissenting) upheld the warrant, finding that the warrant did not "justify the examination of every piece of paper in a suspect's home." 966 F.2d at 845. Here however, a search for any record of an "illegal activity" would allow the agents to seize every piece of paper, including material in women's handbags, children's schoolbags, airducts and cisterns, which is exactly what occurred here.

United States v. Ables, 167 F.3d 1021, 1033 (6th Cir. 1999) involved charges of money laundering and illegal gambling business. The warrant contained a broad list of material to be seized as well as "other items evidencing the obtaining, secreting, transfer and/or concealment of assets and the obtaining, secreting, transfer and/or expenditure of money." The court held that the description of specific items to be seized earlier in the warrant limited the definition of the "other items" specified in the final catch-all provision.

In another case cited by the government, *United States v. Travers*, 233 F.3d 1327 (11th Cir. 2000), the warrant called for a broad list of financial documents, but it was limited to documents relating to false identity or fraud, unlike the situation here which called for evidence of any "illegal activit[y]." In *United States v. Young*, 745 F.2d 733, 758 (2d Cir. 1984), the warrant called for a broad range of evidence of a conspiracy to distribute controlled substances. In *United States v. Wuagneux*, 683 F.2d 1343, 1350-151

(11th Cir. 1982), the warrant called for a broad range of documents relating to a "kickback" scheme. The court upheld the warrant since the search warrant affidavit contained a very detailed description of what scheme was involved. In this case, there was no search warrant affidavit that defined the types of crimes involved and gave guidance to the searching agents. Similarly in *United States v. Logan,* 250 F.3d 350, 365 (6th Cir. 2001), a broad warrant was upheld because of the limitation and specific descriptions of the crimes contained in the search warrant affidavit.

Finally, in *Andresen v. Maryland*, 427 U.S. 463 (1976), warrants were issued to search for evidence of a single, allegedly fraudulent real estate transaction. The defendant in that case had agreed that, for the most part, the warrants were "models of particularity" but argued "they were rendered fatally 'general' by the addition, in each warrant, to the exhaustive list of particularly described documents, of the phrase 'together with other fruits, instrumentalities and *evidence of crime* at this (time) unknown. . . .'" 427 U.S. 479 (emphasis added). Defendant argued that the italicized language authorized a general search for evidence of "any crime" whatsoever. This Court disagreed, finding that this language could not be read in isolation and that the "term 'crime' in the warrants refers only to the crime of false pretenses with respect to the sale of Lot 13T." 427 U.S. at 479. This interpretation was certainly plausible in the context of warrants unquestionably issued to search for evidence of a single crime involving a single transaction. In addition, the searching officers did have the advantage of possessing the search warrant affidavits to assist them in limiting the search.

This case is unprecedented in permitting such a

broad search based on such expansive language in a warrant and would create a conflict with the decisions of numerous other circuits which have rejected warrants with such broad language. *See Rickert v. Sweeney*, 813 F.2d 907, 909 (8th Cir. 1987) (a warrant's factual statement, limited only by references to the general conspiracy and tax evasion statutes, did "not limit the search in any substantive manner"); *United States v. Spilotro*, 800 F.2d 959 (9th Cir. 1986)(warrant for records, documents, cash and other items which were evidence of any of 13 listed federal statutes impermissibly broad); *Voss v. Bergsgaard*, 774 F.2d 402 (10th Cir. 1985) (overbroad warrant authorizing seizure of various categories of documents pertaining to conspiracy to defraud government); *United States v. Abrams*, 615 F.2d 541, 543 (1st Cir. 1980) (warrant for "certain business and billing and medical records" showing actual and "fraudulent services" alleged to have been performed in a scheme to defraud the United States and submit false Medicare claims in violation of 18 U.S.C.§ 1001, overbroad).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

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